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Abstract

This paper looks at the increasingly important role corporate legal compliance is taking in multinational corporations. It provides background information on corporate governance legislation and the resulting motivation for corporations developing legal compliance departments. The focus then turns to topics of particular interest to corporations involved in international commerce: antitrust compliance, bribery & corrupt practices, and anti-money laundering. These topics are illuminated by case law, statutes, and policy papers from around the world, but should be considered keeping United States legal and business practice as a foundation. With this in mind, this paper argues that what once was viewed as overly cumbersome U.S. corporate business practice is now becoming the standard for corporate behaviour on the international stage.

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Introduction

The layman imagines that a lawyer's work is limited to the confines of a courtroom, when in fact there is a diversity of settings in which a lawyer can be found. One of the least known settings for lawyers, even amongst legal professionals, is the world of corporate legal compliance management. This field, often categorized under "regulatory affairs," "preventive law", or simply "compliance," is in expansion and consequently in need of a growing number of legal professionals proficient in compliance-related subject areas. Legal compliance is interdisciplinary in that it is a combination of law, risk management, business ethics, governance, and often, knowledge of a specific sector (examples include sustainability, technology or banking). It is also an increasingly international field as companies spread their cross-border holdings and dealings, bringing into play a host of potential legal liabilities depending upon the legislative landscape in question. The complexity of managing these legal comings-and-goings is the responsibility of corporate legal departments (i.e. "in house" counsel) that liaise with the departments of risk management and internal audit. However, the increase of legislation related to corporate dealings resulting from the large corporate collapses characteristic of the later half of the 20th century has led to the creation of independent legal *compliance* departments within many multinational corporations. These departments are charged with creating a database of relevant existing and emerging legislation and ensuring the duties arising from such legislation are understood and practiced by the business' board, management, and staff. Legal compliance is thus a set of policies and related procedures/practices that, in combination, are intended to prevent and detect wrongdoing.¹

As the field of legal compliance has grown, so has the number of entities contributing to refining how it is practiced. For decades, legal compliance was not only a sub-division of legal departments as previously mentioned, but also a sub-category of what has come to be known as corporate governance. In the United States context, large-scale and meaningful attention to corporate governance only appeared in the 1980s and legal compliance is only now receiving full treatment by legal scholars. It is becoming clear that legal compliance is no longer a peripheral matter, but one that is of increasing importance to corporations whose success is linked to its ability to link profitable corporate behaviour with the ethical behaviour

¹ American Bar Association (ABA) Committee on Corporate Counsel, The In-House Counsel's Essential Toolkit p. xix (2007).

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prescribed by the law. For multinational corporations, the complications are amplified by factors such as conflicting overseas legislation, enforcement authority, and local culture and practice. As multinational corporations have become more familiar with the requirements of compliance legislation, there appears to be a convergence in practice that is being reflected in the surge of policy papers recommending standardization of corporate legal compliance across the globe. This paper aims to provide a survey of the world of corporate legal compliance by providing (1) the reasoning behind establishing a legal compliance department, (2) a discussion of compliance topics unique to multinational corporations, (3) an expose of a sector-specific compliance program (4) an analysis of an actual corporate compliance scandal and (5) a few notes on emerging legal compliance personalities and tools.

The first chapter will outline the principles that have given rise to the contemporary corporate legal compliance regime. Legal compliance management is a system targeted at avoiding or reducing corporate legal responsibility, otherwise known as corporate liability. It is thus important to have an understanding of how corporations came to be legally responsible parties, a phenomenon that will be demonstrated via an exploration of seminal cases and legislation in various jurisdictions. Next, there will be an evaluation of how these laws on corporate liability have been incorporated into corporate legal compliance programs: this has mostly been reflected in increased attention and enforcement of corporate codes of conduct. Last, there will be a discussion of the benefits of establishing an effective legal compliance program which will focus primarily on the United States Sentencing Guidelines that incentivize the creation of such programs.

The second chapter will profile legal compliance topics that are distinctly international in nature. The activities chronicled here require legal compliance professionals to cooperate with multiple bodies on both a local and international level. While there are several topics that could be included here, Antitrust Compliance and Bribery & Corrupt Practices are the most prominent and have been selected.

The third chapter will chronicle the banking sector in order to provide a complete view of how legal compliance works in one type of multinational corporation. Instead of the piecemeal perspective characterizing other parts of the

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paper, the Anti-Money Laundering compliance regime will be covered in its entirety: core legislation, key training and investigative programs, international cooperative efforts, and consequences for those who undermine the regime.

The fourth chapter will delve into a case study pulled from contemporary corporate practice that demonstrates the importance of implementing the elements necessary to an effective corporate compliance program. The unique feature of this segment is that the case study will be structured in form of a "standard form" legal compliance assessment; these assessments compile and control information about company operations within a particular business context and taps employee communication networks, in order to report wrongdoing and prevent disputes.

The concluding fifth chapter will provide a glimpse into emerging topics within the corporate compliance sphere. Of particular importance is the rise of a new corporate personality that straddles the business and legal arms of the corporation, traditionally known as the corporate ombudsman. Last, the role of e-compliance in the Internet age will be touched upon.

Ultimately, this thesis has been organized in a manner that will provide a good grounding of the world of corporate legal compliance management to the uninitiated legal professional. Chapter 1 will outline the principles giving rise to and currently characterizing corporate compliance, Chapter 2 will highlight corporate compliance activities in the international context, Chapter 3 will unify the discussion via an expose of a complete compliance program in a specific-sector, Chapter 4 will provide a case study taken from contemporary corporate practice, and Chapter 5 will speak to emerging issues.

Chapter 1
The Foundations of Corporate Legal Compliance

I. Corporate liability

(a) Principles of corporate liability

In a culture dominated by headlines featuring corporate defendants and their alleged offenses, it is no surprise that there is a general idea that the ability to impute legal liability to a corporation has always been a viable legal option. However, this is a 20th century phenomenon that represents a change from the common law rule that viewed corporations as legal fictions². As commercial exchanges began to be managed by corporate entities instead of individual tradesmen, the United States Supreme Court felt it was time to abandon the doctrine that corporations were not indictable. From this point on, not only could corporations be held liable for "crimes committed or authorized by those at the policy-making level of the corporate hierarchy, but also for the criminal acts of subordinate—even menial—employees."³ , In *New York Central & Hudson River Railroad v. United States*, the Court held:

It is now well established that in actions for tort the corporation may be held responsible for damages for the acts of its agent with the scope of his employment...[T]he liability is not imputed because the principal actually participates in the malice or fraud, but because the act is done for the benefit of the principal...Applying the principle governing civil liability, we go only a step further in holding that the act of the agent, while exercising the authority delegated to him...may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting...⁴

In so holding, the door was open for the development of public policy directed at incentivizing corporations to maintain strict control over their operations.

This public policy doctrine substantially broadened the responsibility of corporations under even the most classic common law doctrines, such as *respondent superior*. "A corporation may also be found liable for illegal activities of an employee, even if there is no benefit to the corporation, where the risk was created by the very activity of the employee that the employer should have foreseen (e.g., a

² Theodore L. Banks and Frederick Z. Banks, Corporate Legal Compliance Handbook, 2nd Edition p. 1-7 (2012).

³ Kathleen F. Brickey, Corporate Criminal Liability: A Primer for Corporate Counsel, 40 Bus. Law. 129, p. 1 (1984).

⁴ New York Central & Hudson River Railroad v. United States, 212 U.S. 481, 493 (1909).

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bouncer at a nightclub who uses excessive force.)"⁵ In a large corporation however, it is often difficult to prove the exact scope of employment of an employee or even accurately pinpoint the nature of a situation involving chains of command that are long and removed from the place where a violation may have occurred.⁶ If one adds to this an international element, establishing corporate liability under *respondeat superior* becomes even more complex:

"The principle of legal separation of the parent corporations from their subsidiaries, and even more so from their supply chains, makes the mechanisms of vicarious liability...useful only to a very limited extent...[It] does not come into play in those situations where the physical integrity of the employee or the local population was affected through acts such as assault or battery committed by employees, unless the use of force was part of their employment...Generally, it would not apply, for instance, to situations of collusion of interests between a repressive regime and a transnational corporation..."⁷

The complexity of the international corporate context—social, economic or legal—contacts blurs the clarity that is necessary to unequivocally establish corporate liability under *respondeat superior*.

In view of the foregoing, courts have utilized lesser-known doctrines to establish corporate liability. Some US courts have established corporate liability by simultaneous application of the doctrine of identification and collective knowledge. "The doctrine of identification is a common law test developed from a series of fraud cases which marked the recognition of corporations as capable of committing offences that required proof of a mental element (*mens rea*)."⁸ To establish this mental element, the doctrine of "collective knowledge" can be used when no *particular* corporate agent can be identified to establish liability.⁹ In such cases, pieces of knowledge can be taken from a *collection* of individual agents to establish the requisite *mens rea* for corporate liability.¹⁰ As a result, in some jurisdictions,

⁵ Banks, *supra*, at 1-12.

⁶ Ed. Doreen McBarnet et al. The New Corporate Accountability: Corporate Social Responsibility and the Law, "Changing paradigms of corporate criminal responsibility: lessons for corporate social responsibility" p. 405 (2007).

⁷ *Ibid*, p. 405.

⁸ *Ibid*, p. 406.

⁹ Banks, *supra*, p. 1-12.

¹⁰ Anthony Ragozino, Replacing the Collective Knowledge Doctrine with a Better Theory for Establishing Corporate Mens Rea: The Duty Stratification Approach, 24 Sw. U. L. Rev. 425, p. 431 (1994-1995).

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corporations can theoretically be charged with offenses such as manslaughter, typically reserved for natural persons. As the 20th century progressed and the number of corporate scandals surged, even on the international level, numerous other corporate liability paradigms gained prominence.

While corporate liability is treated in an especially aggressive manner in the United States, other countries have also made efforts to regulate corporate behaviour, usually via administrative or civil laws.¹¹ The international approach often diverges from the US model in terms of both impetus and intention. Using the Republic of South Africa as an example, scholarly commentary on corporate liability is based less in a desire to impose onerous punitive measures on corporations consistently engaging in improper conduct, but more in reassuring potential investors of the stability of South African corporations and its overall economy.¹² This approach is reflected in their corporate liability legislation where the Companies Act and Criminal Procedure Act, in relationship with the Constitution of 1996 form the legal basis for corporate business entities. Section 332 of the Criminal Procedure Act 51 of 1977 provides for the prosecution of corporations and members of associations:

For the purpose of imposing upon a corporate body criminal liability for any offence, whether under any law or at common law-

- a) any act performed, with or without a particular intent, by or on instructions or with permission, express or implied, given by a director or servant of that corporate body; and
- b) the omission, with or without particular intent, of any act which ought to have been but was not performed by or on instructions given by a director or servant of that corporate body, in the exercise of his powers or in the performance of his duties as such director or servant, or in furthering or endeavoring to further the interests of that corporate body, shall be deemed to have been performed (and with the same intent, if any) by that corporate body, or, as the case may be, to have been an omission (and with the same intent, if any) on the part of that corporate body.

Other jurisdictions, less focused on punitive elements, are in line with this articulation of what constitutes corporate liability as it highlights the fact that corporations must pay close attention to their every move, as regulations pertaining

¹¹"What makes America so unique is that it imposes significant criminal liability *in addition* to those administrative and civil regulations." *From: Edward B. Diskant, Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure*, 118 Yale L.J. 126, p. 5 (2008).

¹² Jean Jacques Du Plessis et al., *Principles of Contemporary Corporate Governance*, p.127 (2010).

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to them are "not based on strict definition of the specified result, as with most legal regulations, but the mere lack of protecting for any potential harm emanating from their actions."¹³ More clearly, this legislation articulates corporate liability for both positive and negative action (i.e. "act" or "omission") that ultimately benefits the corporation.¹⁴ Legislation of this kind is practical in the domestic context, but establishing global legislation with a potential for impact on multinational corporations has resulted in the international legal regime adopting a softer approach: the principles of corporate governance.

(b) The Sarbanes-Oxley Act and Corporate Governance

The global acceptance of some form of corporate liability is a legal given and has been expressed through various mechanisms, but none have attempted to provide corporations with specific guidelines on practices they could incorporate to shield themselves from wrongdoing.

The United States Sarbanes-Oxley Act (SOX)¹⁵ not only provides guidelines, but *imposes* corporate governance standards on U.S. corporations and those listed on U.S. stock indexes. "SOX is not a freestanding statute. Instead, it is built upon the existing framework of state corporation codes and federal securities laws that have long governed corporate governance."¹⁶

The first version of SOX was passed in 2002 and has since been amended several times as corporations still found ways to outmanoeuvre the legislation in place. It is a very comprehensive piece of legislation in that it touched the workings of not only publicly held corporations¹⁷, but also their external auditors/accountants:

¹³ Celia Wells, Corporations and Criminal Responsibility, p. 6 (2001).

¹⁴ Criminal Procedure Act 51 of 1977 (South Africa), Section 332 (1).

¹⁵ Formally known as the Public Company Accounting Reform and Investor Protection Act of 2002 (USA), Pub.L. 107–204.

¹⁶ Stephen M. Bainbridge, The Complete Guide to Sarbanes-Oxley: Understanding How SOX Affects your Business p. 21 (2007).

¹⁷ "Most of SOX's key operative provisions apply only to reporting companies, that is, corporations required to register with the SEC, or in colloquial terms, public corporations. Out of 4 million-plus corporations in the US, SOX therefore directly affects only about 13,000-odd corporations...Two of SOX's provisions---those relating to document destruction and protection of whistleblowers--apply not only to reporting companies, but also closely held businesses and nonprofit entities. In addition, many nonprofits and small businesses comply voluntarily with many SOX provisions." *From: Ibid.*, p. 33.

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SOX fashioned several different mechanisms to address the most egregious corporate practices that undermined investor confidence in both independent audits and the financial markets more generally. SOX created an independent regulatory framework for accounting firms serving public companies, constructed measures to ensure the independence of outside auditors, strengthened the requirements of corporate governance and responsibility, enacted measures designed to increase transparency of financial reporting, bolstered the independence of securities analysts, and expanded existing civil and criminal remedies and penalties for securities laws violations.¹⁸

In sum, corporate governance oversight powers—notably audit and certification—that were once strictly private sector issues, now fall within federal government legal authority as a result of the statute. While many of the provisions of SOX do not touch the everyday activities of corporations, there are several sections that are of importance to legal compliance departments. These sections include the creation of new administrative bodies to which corporate compliance departments must report, new regulations aimed specifically at corporate executives¹⁹, and federally established standards for the content of corporate codes of ethics.

The three administrative bodies created under SOX have been criticized for being primarily investigative agencies that automatically assume corporations are SOX violators. The Public Company Accounting Oversight Board (PCOAB) was created as a nonprofit corporation whose objective is to oversee auditing roles once left to private firms²⁰. More overt in their corporate "prejudice" is the U.S. Department of Justice (DOJ) who established the Corporate Fraud Task Force that attends to the criminal provisions of SOX legislation²¹. The taskforce also has monitoring responsibilities in that it "provides direction and recommendations for the investigation and prosecution of cases of corporate fraud and other financial

¹⁸ Banks, *supra*, p. 3-6.

¹⁹ Executive status is usually determined by evaluating corporate pay grades.

²⁰ The irony is that corporations now pay outside auditors and a SOX-created "accounting support fee" that funds PCOAB operations. *From: Bainbridge, supra*, p.187

²¹ The Securities and Exchange Commission can only contend with administrative/civil law SOX violations.

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crimes."²² The last administrative body is less a separate entity and more an expansion of the Securities and Exchange Commission (SEC); this new department is charged with overseeing lateral organizations whose operations indirectly influence corporate behaviour. For example, a responsibility assigned to the new SEC section is the oversight and approval of any rule changes by the various securities exchanges (i.e. NYSE/NASDAQ).²³ The DOJ Corporate Fraud Task Force and the expanded SEC section are of special interest to compliance professionals because they interpret and clarify the SOX compliance regime. In general, these administrative bodies are important for corporate compliance departments because they all serve as evaluators of the effectiveness of compliance programs. Cultivating a strong relationship with these government administrators could improve a corporation's standing in the regulatory sphere and reduce the unkindly view of corporations by oversight entities.

The next important section of SOX for compliance professionals relates to its regulation of people within the corporate entity. SOX elaborated strict rules for the behaviour of internal accountants/auditors, attorneys and executives. Again, we set aside the accounting aspect because this paper is directed more toward the obligations of legal compliance professionals.²⁴ Beginning with attorneys, SOX regulations were incorporated into the *Rules of Professional Responsibility for Attorneys* thus normalizing the standards for all US bar-qualified legal practitioners. SOX Section 307 established what is known as an "up the ladder" reporting obligation. Should an attorney²⁵ have reasonable suspicion²⁶ of a SOX provision²⁷

²² Banks, *supra*, p. 3-16.

²³ A task previously privately regulated by the securities exchanges exclusively.

²⁴ "SOX stressed an increased role for the audit committee and a decreased role for company management in overseeing the audit process. The practical result of this shift of power is that the audit committee changed from a fringe player in the financial reporting process essentially to an inspector general of the company's finances, with its own budget and the power to hire independent counsel and advisers." *From: Banks, supra*, p. 3-32.

²⁵ In deciding whether to report information, the rule considers an attorney's professional skills, background, experience, including previous experience and familiarity with the client at issue, time constraints, and the availability of other lawyers with whom the lawyer may have been able to consult. *From Banks, supra*, p. 3-61.

²⁶ The definition of "reasonable" and "reasonably believes" can be found in SEC Release No. 33-8185 or 33-8150.

²⁷ Usually material violations of securities law, breach of fiduciary duty or similar.

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violation, they must report along the following chain until appropriate corrective measures are taken: (1) to the chief legal officer or CEO (2) the audit committee/committee of independent directors (3) the full board of directors. A hallmark of SOX Section 307 is the last resort measure, the "noisy withdrawal," required of attorneys should none of the above entities respond to attorney's reasonable suspicions²⁸. The "noisy withdrawal" applies to both outside and in-house counsel:

For outside counsel, this meant withdrawing from representation of the company, notifying the SEC of the withdrawal, and disaffirming documents filed with the SEC that the attorney believes violate securities laws, fiduciary obligations or other similar violations. For in-house counsel, only the last step--disaffirming "tainted" documents filed with the SEC--would be required.²⁹

This particular provision has come under fire and the final word on its future within the *Rules of Professional Responsibility* is still in question. In sum, some scholars have described this as a form of imposed legal "sabre rattling" on attorneys that undermines the unity of executive departments (legal vs. the rest) required for sound compliance with governance rules.

While SOX may have introduced certain burdens on bar-qualified legal professionals, corporate executives bore even greater responsibilities under the statute while simultaneously losing fringe benefits they had long enjoyed. SOX Sections 302 and 906 introduced principal executive and financial officer certification requirements that if breached incur civil (S 302) or criminal penalties (S 906). "SOX Section 302 made those signing the certification [annual or quarterly reports] directly responsible for the fair presentation of material in their company's financial reports."³⁰ This certification is required across the board and its wording/substance cannot stray from that provided by the SEC, examples include:

1. The signing officer has reviewed the report.
2. Based on the officer's knowledge, the report does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of

²⁸ The noisy withdrawal was initially included in the SOX rules, but was subsequently withdrawn. I include it because of current scholarly debate involving whether it should be reinstated. *See: Banks, supra*. p. 3-59, p. 3-63.

²⁹ *Ibid.*, p. 3-59.

³⁰ *Ibid.*, p. 3-36.

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the circumstances under which such statements were made, not misleading.

6. The signing officers have indicated in the report whether or not there were significant changes in internal controls or in other factors that could significantly affect internal controls subsequent to the date of their evaluation, including any corrective actions with regard to significant deficiencies and material weaknesses.³¹

SOX Section 906 is directed specifically toward CEOs and CFOs, as opposed to principal executive officers in general, and mirrors SOX 302 in wording and substance. However, this section is seen to be more serious as false certifications (and thus, those who falsely certify) can incur monetary penalties accompanied by prison sentences of up to 20 years. The degree of the penalty is based upon whether false certification was done knowingly, willingly, or at worst, both.³² These executive certification requirements enter into the gamut of legal compliance professionals because of their duty to ensure that all levels of management are following SOX corporate governance provisions. This core compliance department task entails having full knowledge of executive officer duties, collecting from throughout the corporation the requisite information the executive needs to be in compliance with such duties, and finally, ensuring communication and performance of these last to executives.

The importance of the corporate governance regimen prescribed by the Sarbanes-Oxley Act is not due to its apparent rigor but due to its "symbolic statement of intent."³³ Despite having one of the most comprehensive corporate law regimes in the world prior to SOX, "US regulatory structures were incapable of instilling credible ethical restraints."³⁴ The passage of the act was the main indicator that corporations were going to need to make significant and meaningful changes to their internal operations should they wish to steer clear from conduct for which they can be held liable.

³¹ Ibid.

³² Ibid., p. 3-47.

³³ Ali Gregoriou. International Corporate Governance After Sarbanes-Oxley p. 14 (2006).

³⁴ Ibid, p. 25.

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II Corporate integration of corporate governance legislation

In light of the changes in corporate governance standards, corporations have expanded their legal compliance departments to grapple with the onslaught of legislation and more importantly, instill an ethical business culture within the organization. Consequently, legal compliance departments have been endowed with more authority as government authorities have forced companies to move away from "rote lists of figures" and to more descriptive disclosure of their operations.³⁵ With this new authority, legal compliance departments are slowly fulfilling their charge primarily through corporate legal training programs and the creation of carefully crafted corporate codes of conduct.

(a) Training Programs

What distinguishes the legal compliance department from traditional legal/in-house counsel within an organization is the range of effective communication expected from the compliance end. While in-house counsel can simply concentrate on legalese, compliance professionals must be able to translate legal terminology into accessible English. "The language should be clear and understandable by employees, but not so informal that it will not be taken seriously."³⁶ Compliance departments use this "accessible English" to produce a variety of training materials: presentations, written support materials, audiovisual support, and in some cases skit-writing using hired actors.³⁷ An effective compliance training program is best summarized in the following passage:

"A compliance communications program has multiple purposes. It should convey substantive legal information so that employees will do the right thing and also tell employees what to do if something happens, or where to go if they have a question. Employees should feel comfortable going to the law department to seek guidance. If they are comfortable with the legal staff and know how to find an attorney, they will be. This is all part of reinforcing (or creating) a culture of compliance."³⁸

(b) Corporate Codes of Conducts

³⁵ Inside the Minds Series, SEC Compliance Best Practices: Leading Lawyers on Understanding Disclosure Requirements, Developing Compliance Procedures, and Advising Clients on Reporting Practices p. 19 (2009).

³⁶ Banks, supra, p. 17-3.

³⁷ Ibid., p. 17-12.

³⁸ Ibid., p. 17-13.

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In the last decade, the most visible impact compliance departments have had on corporations can be seen in the increased emphasis on the creation and application of Codes of Conduct.³⁹ A code of conduct is a "distinct and formal document containing a set of prescriptions developed by and for a company to guide present and future behaviour on multiple issues of at least its managers and employees toward one another, the company, external stakeholders and/or society in general."⁴⁰ The classical legal amongst legal scholars has been that codes of conduct create moral obligations but have no real legal enforceability.⁴¹ Good compliance departments however, recognize a shift in contemporary legal commentary that leads to a different conclusion:

"There is plenty of scope in law...to transform not just voluntary CSR reports, but also voluntary codes of conduct, into standards to which companies can be held legally accountable." A 2005 European Directive specifically, if in somewhat limiting terms, includes non-compliance by a company with its code of conduct as an instance of misleading commercial practice...leading [one] to ask whether private codes of conduct can really be seen as voluntary rather than legally binding."⁴²

In light of the above, corporate legal compliance departments must make sure to draft codes of conduct that consider legal frameworks, stakeholder expectations and a corporation's ability to commit to the standards they publically espouse.⁴³

Corporations around the world have drafted Codes of Conduct that are readily available on their websites, usually under "governance" or "compliance" headings. Entitling these corporate documents "codes" is perhaps misleading, as they are less an assembly of rules and more a list of principles corporations aim to embody. This follows the consensus of legal scholars who have concluded that the best corporate codes should not be "prophylactic:"

While there may be a temptation to enact a strict and comprehensive code, the temptation to cover absolutely

³⁹ Other names for equivalent documents include: code of conduct, business principles, corporate credo, corporate philosophy, corporate ethics statement or code of practice.

⁴⁰ Muel Kapstein, The Effectiveness of Business Codes: A Critical Examination of Existing Studies and the Development of an Integrated Research Model, 77 J. Bus. Ethics 111, p.113 (2008).

⁴¹ Doreen McBarnet, The New Corporate Accountability, "Corporate codes of conduct: moral or legal obligation?" p. 120 (2009).

⁴² McBarnet, supra, p. 41.

⁴³ Ed. Kernaghan Webb, Voluntary Codes: Private Governance, the Public Interest and Innovation p. 86 (2004).

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everything in great detail should be avoided. It is usually best to establish broad principles of ethical behavior and provide a mechanism for employees to review conduct, rather than try to prohibit everything, which may require granting frequent exceptions to code application as it is discovered that the overly prophylactic rules go beyond control of any ethical risks.⁴⁴

In drafting non-rules based codes, legal professionals should take special note because it could be counterintuitive to those accustomed to creating rules-based regimes. As a result, legal compliance professionals must widen their normal "sources of law," bypassing strict attention to *hard law*⁴⁵ and also considering secondary sources such as model business principles and cutting-edge policy papers on corporate best-practice and governance published by non-state actors (i.e. legal think tanks, industry-specific organizations, etc...)⁴⁶ The most sophisticated legal compliance departments also have mechanisms that allow the public at large to comment on their codes of conduct to ensure that they are in tune with what is relevant to today's fast-paced business environment. For multinational corporations, the use of secondary sources is especially important because they seem to best capture globally agreed-upon business governance standards.

Taking into consideration several corporate codes of conduct from multinational corporations, it becomes apparent that there is indeed a normalization of approach by legal compliance departments. For comparison, we look to the Codes of Conduct of McDonald's⁴⁷, NIKE, Inc.⁴⁸, and Arcelor Mittal group⁴⁹. All corporations have a corporate governance or compliance section prominently displayed on their websites, uniformly translated into the native language of all markets influenced by their corporate conduct. Differences between the corporations

⁴⁴ Banks, *supra*, p. 15-4.

⁴⁵ Defined as legislation, statutes, codes, case law and other active and applicable legal rules.

⁴⁶ The most prominent secondary sources for multinational corporations include the American Legal Institute's Principles of Corporate Governance, the OECD Principles of Corporate Governance, UN Global Compact, and the Council of Institutional Investors Policies on Corporate Governance.

⁴⁷ McDonald's Standard of Business Conduct for Employees, available at http://www.aboutmcdonalds.com/mcd/investors/corporate_governance/codes_of_conduct/standards_of_business_conduct.html.

⁴⁸ Nike, Inc. Compliance, available at <http://nikeinc.com/pages/compliance>.

⁴⁹ Arcelor Mittal, Governance, available at <http://www.arcelormittal.com/corp/who-we-are/leadership/governance>.

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lay only in the ambition compliance departments have displayed in the scope of their codes of conduct.

Standard procedure within these codes includes first, a declaration of the corporation's ethical standpoint, followed by a selection of rules and fact-patterns whose objective is to guide employee conduct to within the law. Examples from the corporations referred to prior follow:

McDonald's is committed to conducting business ethically and in compliance with the letter and spirit of the law. This commitment is reflected in McDonald's Values. Inherent in each value is our commitment to be ethical, truthful and dependable and this is reflected through our *Standards of Business Conduct* which serves as a guide to making good decisions and conducting business ethically.⁵⁰

Our greatest responsibility as a global company is to play a role in bringing about positive, systemic change for workers within our supply chain and in the industry. When we look at our overall impact on the world, the needs of nearly 1 million workers in Nike's contract supply chain overshadows any other group. We also know the size and scale of the combined manufacturing operations has a considerable environmental impact. Since our Code was first adopted in 1991, it has evolved to provide consistency, clarity and alignment across NIKE, Inc., and the industry. It remains a straightforward statement of values, intentions and expectations meant to guide decisions in factories.⁵¹

Good governance is a guiding principle at ArcelorMittal. Our definition of good governance has three main elements. First, it means ensuring compliance with the external regulations and reporting requirements that come with being a listed company. Second, good governance is about having a continuous dialogue with our stakeholders, and strictly following our internal company policies and procedures on issues such as risk management and responsible sourcing. Finally, good governance has a wider definition in the sense of being a good corporate citizen. This means acting appropriately in our position as a major multinational organisation and fulfilling the objectives of our governance and corporate responsibility agenda.⁵²

Delving deeper into the codes, legal compliance departments make sure to mention applicable laws and their consequences to employees--most frequently mentioned are Sarbanes Oxley and the US Foreign Corrupt Practices Act--but in laymen's form. There is frequent use of fact patterns in which employees could find themselves,

⁵⁰ McDonald's Standard of Business Conduct for Employees, supra.

⁵¹ Nike, Inc. Compliance, supra.

⁵² Arcelor Mittal Code of Business Conduct, available at <http://www.arcelormittal.com/corp/~media/Files/A/ArcelorMittal/who-we-are/Code-of-Business-Conduct.pdf>.

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accompanied by the expected behaviour to be in keeping with the regulation in question. Arcelor Mittal has an extensive list of situations: competition and antitrust, involvement in political activities, trading in the securities of the company, offering gifts and entertaining, amongst others. An example follows:

...[If] tickets for a sporting or cultural event are offered to us, the person offering the tickets must also plan to attend the event. In general, offers of entertainment in the form of meals and drinks may be accepted, provided that they are inexpensive, infrequent and, as much as possible, reciprocal. As these instructions cannot cover every eventuality, we are all required to exercise good judgment. The saying «everybody does it» is not a sufficient justification. If we are having difficulty deciding whether a particular gift or entertainment falls within the boundaries of acceptable business practice, we should ask ourselves the following questions [questions omitted]...In case of continuing doubt, we should consult our Supervisor or the Legal Department.⁵³

The most efficient codes of conduct identify issues via a statement of facts, provide doctrine that should guide behaviour, and elucidate legal recourses available to employees.⁵⁴ Some corporations go beyond codes of conduct limited to their employees, representing an increasingly common expanded role of this compliance tool. It is not atypical for multinational corporations to provide codes of conduct for their subsidiaries⁵⁵ or even local companies simply making up a part of their supply chain. The range of entities corporate codes of conduct attempt to loop into its sphere reflects compliance departments' efforts to deflect liability emanating from the largest to even the smallest actors. Codes of conduct have thus become the first mechanism corporations use to guide corporate strategy and employee behaviour with the goal of preventing conduct that could jeopardize their future viability.

III Compliance Program Benefits under the US Sentencing Guidelines

⁵³ Ibid.

⁵⁴ Some corporations have subdivided their codes of conduct by job position. McDonald's, for example, has a "Director Code of Conduct," a "Financial Officer Code of Ethics" and an all encompassing "Standard of Business Conduct".

⁵⁵ Nike has subdivided their codes of conduct by company subsidiary: there is a Nike, Inc. Code of Conduct and two for their other holdings Converse and Hurley.

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Should the preventive factor not be strong enough incentive for a corporation to create a compliance department, the more tangible factor of mitigation for corporate legal violations under the United States Sentencing Guidelines (USSG)⁵⁶ represents more than sufficient fodder. As mentioned prior, the legal compliance professional must be concerned with keeping internal entities within the parameters of the law, but their main responsibility is to ensure, within the legal context, the future viability of the entire corporation. Thus while there are a host of statutes regulating corporate behaviour, compliance with them must be done in consideration of the impact of the Organizational Sentencing Guidelines of the United States Sentencing Commission. Otherwise known as the United States Sentencing Guidelines, these guidelines are used by all US federal courts when sentencing corporate criminal cases.⁵⁷ They represent the consequences that truly affect a corporation's fiscal future.

The USSG's by-line is that they are not in the game of punishing corporations, but simply an entity which seeks to ensure that those damaged by corporate misconduct receive just redress. It has four fundamental principles that underscore this goal; the first, as previously mentioned, is to promote remedy and not punishment, the next three follow.

(2) If the offending organization is found to exist primarily for a criminal purpose or conducts business primarily by criminal means, the fine imposed should be large enough to divest the corporation of its assets.

(3) The fine assessed should be based on the seriousness of the violation and the culpability of the organization. Culpability is determined by a number of factors that the court must consider. Two of these factors permit the mitigation of the ultimate punishment. These two factors are the existence of an effective compliance and ethics program and self-reporting, cooperation, or acceptance of responsibility.

(4) Probation may be appropriate to ensure the implementation of another sanction or to reduce the likelihood of future criminal conduct. Probation may include a court-implemented and supervised compliance program.⁵⁸

⁵⁶ The Sentencing Guidelines were established as a result of the Sentencing Reform Act of 1984, which sought to correct concerns that the existing system of sentencing did not adequately provide incentives to deter criminal conduct. *From: Banks, supra*, p. 2-10.

⁵⁷ Jeffrey Kaplan and Joseph E. Murphy, Compliance Programs and the Corporate Sentencing Guidelines: Preventing Criminal and Civil Liability p. 3-2 (2010).

⁵⁸ 2011 Federal Sentencing Guidelines Manual, Chapter 8, available at http://www.ussc.gov/Guidelines/2011_Guidelines/Manual_HTML/Chapter_8.htm.

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However, the potential severity of the second principle has forced corporations to view the Sentencing Guidelines as not just a docile public reconciliation body. Thus, solely in the enunciation of its principles, the USSG was immediately able to force corporations into realizing the importance and utility of establishing and maintaining corporate legal compliance departments.

Remedies the USSG has the power to order include corporate "order of notices to victims", remedial orders, community service and restitution. Restitution, usually monetary and in form of fines, represents the primary concern of corporations when faced with legal violations that trigger sentencing. The amount of the fine is determined using a multitude of factors that are ultimately scored and indexed to a particular dollar value:

The culpability score is designed to draw distinctions based on facts suggesting blameworthiness between the broad range of companies that may come before a court for sentencing under the sweeping doctrine of vicarious criminal liability: from companies that made diligent efforts to prevent offenses, but witnessed an employee breach the law nonetheless, to companies whose management planned to crime. Convicted organizations start with a culpability score of 5 on a scale of 10 points. A court is then directed to make factual findings with respect to specified aggravating or mitigating factors...which will call upon it to either add or subtract to these 5 points.⁵⁹

The most significant criteria for mitigation include whether:

- (1) the organization, prior to an imminent threat of disclosure or government investigation, and within a reasonably prompt time after becoming aware of the offense, reports the offense to the government authorities
- (2) fully cooperated with the investigation
- (3) clearly demonstrates recognition and affirmative acceptance of responsibility⁶⁰

Corporations who have implemented a solid compliance program are eligible for significant point reductions from their culpability score which could result in fines being reduced by as much as 95%.⁶¹ If a corporation does not have an approved compliance program in place, there is no flexibility in the culpability score once it has been calculated. There has been some argument as to the utility of the USSG, as

⁵⁹ Kaplan and Murphy, *supra*, p. 3-28.

⁶⁰ 2011 Federal Sentencing Guidelines Manual, Chapter 8 §8C2.5, available at http://www.ussc.gov/Guidelines/2011_Guidelines/Manual_HTML/8c2_5.htm.

⁶¹ Kaplan and Murphy, *supra*, p. 3-28 and Banks, *supra*, p. 2-33-34.

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some critics say that it allows corporations to hire professionals able to manipulate whether certain profit-making corporate misconduct outweighs the USSG penalty.⁶² Were this to be discovered in an investigation however, it would represent an undermining of the spirit of a compliance program whose approval is based on demonstrated preventative conduct by the compliance department.

The United States Sentencing Guidelines have even influenced global compliance practice by "accelerating a trend to see 'compliance' as a separate subject, with common elements that applied to all legal risk areas."⁶³ Enforcement of restitution orders on multinational corporations is becoming more difficult to escape as multiple jurisdictions realize the potential benefits of joining forces: the European Union and the United States have conducted joint antitrust compliance investigations resulting in collections of \$500 million dollars.⁶⁴ What has made the spread of USSG standards so attractive is their basis in "fairly fundamental management principles [that make it] a "useful template in any jurisdiction".⁶⁵ With the growth of international entities dedicated to the monitoring, prosecuting and enforcement of compliance programs, the establishment of compliance departments is evolving from merely a corporate attribute, to a corporate imperative.

⁶² Ilene H Nagel and Winthrop Swenson, Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts about Their Future

71 Wash. U. L. Q. 205, p. 223 (1993).

⁶³ Kaplan and Murphy, supra, p. 21-7.

⁶⁴ Ibid., p. 21-3.

⁶⁵ Ibid., p. 21-13.

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The first chapter elaborated upon general compliance issues that should be of concern to all corporations regardless of the environment in which they conduct business. This chapter will touch upon two compliance topics that are of considerable importance to multinational corporations whose operations span multiple jurisdictions and influence several subsidiaries. These topics are Antitrust Compliance and the international legal framework against corruption, known as Bribery and Corrupt Practices. These topics are important for even those corporations not incorporated in the United States or listed on its stock indexes because of the aggressive way that the US has decided to pursue violation of conduct related to these fields. The "teeth" in US antitrust and corruption legislation has been justified by the classic *effects doctrine*, where "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends."⁶⁶ The United States' insistence that corporations comply with its legislation has changed the field of compliance in that, where once compliance programs needed to be tailored to the local business culture, there is now strong corporate advocacy for standard field-specific international compliance regimes.

Study of the evolution of antitrust compliance is the simplest way to illustrate how U.S. legislation has changed the multinational corporate approach to legal compliance. Antitrust compliance is "a permanent program of education, prevention and detection which aims at guiding the behaviour of a company and all its employees in their relations with competitors, suppliers, distributors, clients etc, in order to ensure full respect to applicable competition rules and legislation."⁶⁷ The

⁶⁶ Stanley D Metzger, The Effects Doctrine of Jurisdiction 61 Am. J. Int'l L. 1015, p. 1015 (1967).

⁶⁷ Marcelo Calliari, Presentation on Global Antitrust Compliance Enforcement, available at http://www.corporatecompliance.org/Portals/1/PDF/Resources/past_handouts/CEI/2012/404_GlobalAntitrustComplianceEnforcement_2slides.pdf.

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first major antitrust legislation came in form of the U.S. Sherman Act⁶⁸ in 1890, which led to a century of the United States acting alone in the creation of a body of antitrust case law. Since the 1980s, there has been an internationalization of antitrust law stemming from the view that society benefits from competition, with almost no jurisdiction left untouched:

Like a classic Fourth of July fireworks show, the global antitrust spectacular--the first or global proliferation phase of it, anyway--may end with a thunderous display. When the last echo of the climactic "silver salutes" in China and India have faded, every major economy on Earth will have an antitrust statute of general applicability to business conduct and transactions. When that occurs, jurisdictions with antitrust laws will account for over 95 percent of world GDP. Take the OPEC nations out of the calculation and the figure is closer to 99 percent.⁶⁹

This trend toward international antitrust law is reflected most prominently in the rise of international organizations dedicated to the topic. The Organization for Economic Cooperation and Development (OECD) has a Competition Committee that "has been active in promoting multilateral cooperation among the numerous competition authorities of the developed world and, through a targeted outreach program, those in the developing world as well."⁷⁰ The United Nations' Intergovernmental Group of Experts on Competition Law and Policy has dedicated itself to offering antitrust technical assistance to developing jurisdictions and peer-reviewing antitrust agencies worldwide.⁷¹ In 2001, an assembly of 13 competition agencies formed the International Competition Network (ICN) that is now revered as the authority on international antitrust law and the guardian of its global standards. There is now no

⁶⁸ "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition." *From: Northern Pacific Ry. v. United States*, 356 U.S. 1, 4-5 (1958).

⁶⁹ Abbott B. Lipsky, Jr., Managing Antitrust Compliance Through the Continuing Surge in Global Enforcement, 75 *Antitrust L.J.* 965, p. 979 (2009).

⁷⁰ *Ibid.*, p. 988.

⁷¹ United Nations Conference on Trade and Development: Group of Experts on Competition Law and Policy, available at <http://unctad.org/en/Pages/Meetings/Group-of-Experts-Competition-Law-and-Policy.aspx>.

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question that what was an American legal eccentricity, is now a universally accepted standard. However, international antitrust laws "cannot have their desired impact without international standards and efforts for compliance."⁷²

Paralleling conclusions reached prior, the benefits of having a corporate antitrust compliance program drastically outweigh the implementation costs multinational corporations often bemoan. Of primary concern to corporations are the fines: criminal antitrust fines obtained by the US Antitrust Division are set to exceed \$3 billion for the period 2000 through 2008.⁷³ Moreover, antitrust violations can leave corporations subject to a host of expensive "procedural devices and remedial incentives" such as minimal civil pleading requirements ("notice pleading"), broad discovery rules (including extensive pre-trial discovery), class action procedures (especially the "opt-out" variety), plaintiff-friendly rules for proof of damages (permitting any estimation methodology short of "mere speculation"), joint and several liability for damages among co-conspirators (without right of contribution or claim reduction), and mandatory award of attorney's fees against losing defendants but no such award--mandatory or discretionary--against losing plaintiffs.⁷⁴ The severity of antitrust violations is not unique to only the United States as countries worldwide have upped their antitrust penalties; in Brazil alone, there are more than 150 on-going cartel investigations and of 200 executives facing antitrust charges in 2011, 40 were convicted and sentenced 5-year prison terms.⁷⁵ If one looks to the European Union (EU), one discovers that in 2011 it almost matched the United States in antitrust violation fine assessments.⁷⁶ Worse still for multinational corporations is the growth of stronger relationships between antitrust governing authorities worldwide who are working together to aid antitrust prosecution proceedings in different jurisdictions.

Worldwide antitrust agencies have been energized by the mega-resource that is their combined intelligence, investigatory, and prosecutorial arm. The first layer of international coordination is the addition of antitrust violations to existing Mutual Legal Assistance Treaties that require the participating states to consult (i.e. ease

⁷² Ted Banks and Joe Murphy, The International Law of Antitrust Compliance, 40 *Denv. J. Int'l L. & Pol'y* 373, p. 373 (2011).

⁷³ Lipsky, Jr., supra, p. 978.

⁷⁴ Ibid.

⁷⁵ Calliari, supra.

⁷⁶ Ibid.

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discovery process, extradite offenders) each other when entities within their jurisdictions incur antitrust charges.⁷⁷ A fruit of such treaties is the use of the Interpol "Red Notice" list for U.S. antitrust offenders: this international wanted list has resulted in the arrest and service of prison terms by defendants from a variety of countries.⁷⁸ It is now not uncommon for several countries to conduct "dawn raids"⁷⁹ (i.e. an unannounced information gathering effort) to benefit antitrust prosecution in multiple jurisdictions:

When dawn raids were conducted on Valentine's Day 2003 in connection with the so-called plastics modifiers case, for example, Canada, the European Union (acting in conjunction with local authorities in its Member States including Belgium, the Netherlands, France, Germany, Italy, and the United Kingdom), Japan, and the United States all coordinated their activities and launched raids all over the world within a narrow time window.⁸⁰

However, international efforts by antitrust agencies have not just focused on capture and prosecution. Again, following a hallmark of the U.S. antitrust legal framework, international antitrust agencies are implementing leniency programs that should be born in mind when corporations develop their antitrust compliance programs. Similar to how the USSG calculates "culpability scores" whose mitigation is dependent upon a corporation's implementation of an effective compliance program, leniency programs incentivize self-reporting by corporations who have participated in cartels. The maximum benefits of such programs are available to corporations who take the lead in admitting their antitrust violations:

Typically, leniency is available only if an applicant is, *inter alia*,
a) the first company to approach the authority about the cartel; b)
is not the ringleader of the cartel; c) takes steps to terminate its

⁷⁷ Julian M. Joshua et al., Extradition and Mutual Legal Assistance Treaties: Cartel Enforcement's Global Reach, 75 *Antitrust L.J.* 353, p. 360 (2008).

⁷⁸ *Ibid.*, p. 361.

⁷⁹ Defined as unannounced inspections in order to preserve the element of surprise and thereby maximize the evidentiary output of common investigative efforts. In Europe, competition authorities conducting "dawn raids" often specifically seek out written legal advice rendered by in-house antitrust counsel, and this legal advice ultimately may be treated as evidence, without regard to any assertion of legal privilege. This is because the European Union does not recognize attorney-client privilege with respect to communications by or with in-house counsel.

⁸⁰ Lipsky, Jr., supra, p. 984.

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involvement in the cartel; and d) provides full cooperation with the authorities in the investigation of the cartel.⁸¹

Leniency programs represent an alternative to prosecution that still capitalizes on joint international efforts and moreover, eases antitrust agencies' burden of constantly being "on alert" for signs of potential corporate violations.

In order to take advantage of leniency programs the establishment of an antitrust compliance program is essential and many organizations have recently published detailed manuals as to how corporations can best launch one. On a general level, antitrust compliance programs should focus on adequately training employees to recognize potential cartels, educating them about the importance of prompt and accurate reporting, and providing the requisite infrastructure for the company to investigate and decide options for leniency depending on the jurisdiction.⁸²

The US Department of Justice (US DOJ) is a good starting point; it has developed a web page—Compliance Assistance Resources for Businesses—that aggregates antitrust statutory provisions, guidelines and policy statements, and links to useful external sources.⁸³ The U.S. Green Building Council has provided a template, based on their own antitrust compliance program, that can easily be retooled by smaller multinational corporations that don't have the resources to develop one from scratch.⁸⁴ The most comprehensive set of recommendations for corporate antitrust compliance best-practice was recently published by the International Chamber of Commerce (ICC) in their April 2013 "ICC Antitrust Compliance Toolkit."

Unlike the majority of compliance program resources, there is no discussion of the antitrust legal framework but instead an emphasis is put on the practical steps corporations can take to institute an antitrust compliance program. The ICC appears

⁸¹ American Bar Association, Antitrust Compliance: Perspectives and Resources for Corporate Counsel, "Special Issues in Planning for Global Antitrust and Competition Law Compliance"

p. 161 (2005).

⁸² American Bar Association, supra, p. 162.

⁸³ United States Department of Justice, Compliance Assistance Resources for Businesses, available at <http://www.justice.gov/atr/public/business-resources.html>.

⁸⁴ U.S. Green Building Council, Antitrust Compliance Policy, available at http://www.usgbc.org/sites/default/files/USGBC_Antitrust_Compliance_Policy.pdf.

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especially proud of the fact that the Toolkit was "designed by business for business,⁸⁵" again emphasizing the practicality of the document:

The toolkit is designed by business for business and reflects contributions from antitrust specialists closely associated with in-house compliance efforts around the world. It is hoped that it will assist companies from all sectors and of all sizes, including small- and medium-sized companies (SMEs) to establish an antitrust compliance programme suited to their needs, risk profile and resources.⁸⁶

The Toolkit is divided into 11 chapters that follow the first introduction of a compliance program into a corporation, to the ways in which the program can be improved into perpetuity:

1. Compliance embedded as company culture and policy
2. Compliance organization and resources
3. Risk identification and assessment
4. Antitrust compliance know-how
5. Antitrust concerns-handling systems
6. Handling of internal investigations
7. Disciplinary actions
8. Antitrust due diligence
9. Antitrust compliance certification
10. Compliance incentives
11. Monitoring and continuous improvement⁸⁷

While the ICC has highlighted the non-legal nature of the Toolkit, what is most notable is the people-centred approach characteristic to the document. There is a call for *someone* within a corporation to take ownership of the compliance effort and ultimately lead a compliance "cultural renaissance " within the organization.⁸⁸ The ICC Toolkit, perhaps unwittingly, made the most practical observation of all: legal knowledge and internal changes in corporate operations (i.e. effective compliance programs) will eventually prove useless should ethics not be a priority to corporate employees.

⁸⁵ International Chamber of Commerce, The ICC Antitrust Compliance Toolkit p. 5 (2013).

⁸⁶ Caroline Inthavisay, ICC unveils Antitrust Compliance Toolkit available at: <http://www.iccwbo.org/News/Articles/2013/ICC-unveils-Antitrust-Compliance-Toolkit/>.

⁸⁷ International Chamber of Commerce, supra, p.13.

⁸⁸ Ibid., p. 13.

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Instilling at least of modicum of ethical behaviour into corporate conduct is the subject of Bribery and Corrupt Practices (B&CP) legislation that has taken hold the world over. There is recognition that "engaging in corrupt practices...creates a very unfavourable business environment by encouraging unfair advantage and anti-competitive practices."⁸⁹ Evidence abounds: the World Bank estimates that 0.5 percent of GDP is lost through corruption each year, studies underscore its corrosive effect on the rule of law and trust in public institutions, and it is one of the primary obstacles to the economic development of a country.⁹⁰ These incontestable facts have led to a standardization of the legal framework governing B&CP, in the same vein as the antitrust regime, with the United States again having drafted the seminal statute. Hampering the logical next step, the standardization of the compliance regimen, is the "local culture" factor that makes it difficult to discern whether certain corporate conduct falls within the sphere of benign business etiquette or should be interpreted as an actual corrupt practice. B&CP compliance highlights the difficulties multinationals face when the normative framework is in place, but the compliance framework cannot be equally fixed due to variances in local business cultures.

The first Bribery and Corrupt Practices statute was the U.S. Foreign and Corrupt Practices Act of 1977 (FCPA) which was the sole legislation of its kind for almost thirty years. One of the more extensively worded statutes, it applies to a host of natural and juridical persons⁹¹ with the objective of preventing them from making a payment to a foreign official for the purpose of obtaining or retaining business. For our purposes⁹², it is best to distil the elements necessary for a conviction under the FCPA into a few short words:

In the prosecution...for a violation of the FCPA...a Virginia district court case indicated that in order to obtain a criminal

⁸⁹ Brian P. Loughman and Richard A. Sibery, Bribery and Corruption: Navigating the Global Risks p.3 (2011).

⁹⁰ Ibid.

⁹¹ Defined as (A) any individual who is a citizen, national, or resident of the United States; and (B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States. *From: Foreign Corrupt Practices Act of 1977 (15 U.S.C. §78).*

⁹² In addition to the anti-bribery provision, there is an accounting provision that requires persons subject to Foreign Corrupt Practices Act to make and keep detailed and accurate financial records.

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conviction under the FCPA, the government must prove beyond a reasonable doubt that the defendant is a

- 1) domestic concern, corporate issuer, individual, firm, officer, director, employee, agent/stockholder of a firm;
- 2) that made use of a means or instrumentality of interstate commerce;
- 3) corruptly;
- 4) in furtherance of a offer or payment of anything of value to any person;
- 5) while knowing that the money or item of value would be offered or given directly or indirectly to any foreign official; and
- 6) for purposes of influencing any act or decision of such foreign official in his or her official capacity.⁹³

There are few exceptions to the statute, but the most prominent is that persons are allowed conduct that facilitates routine government action:

“[FCPA] shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.”⁹⁴

The U.K. Bribery Act of 2010 outdoes the FCPA in that it maintains all of the prior provisions and extends some further:

“[The U.K. Bribery Act] covers all bribery, both commercial and public officials; makes no exceptions for facilitation payments made to expedite routine governmental actions; makes it a corporate offense to fail to prevent bribery; makes it an offense not only to give but also receive a bribe.”⁹⁵

Both statutes are accompanied by sentencing guidelines similar to those discussed previously—corporate prison terms and hefty fine assessments—that corporations all but ignored due to the flagrant lack of enforcement of either statute. The early 2000s brought a reversal that required corporations to incorporate B&CP laws into compliance programs because of the eruption of enforcement efforts by U.S. and British authorities. Initially, the authorities⁹⁶ gave corporations warnings that still went unheeded until actual charges were brought upon them. At a 2010 FCPA conference, a US DOJ official spoke of “a “new era” of FCPA enforcement and

⁹³ Loughman and Sibery, *supra*, p.15.

⁹⁴ Foreign Corrupt Practices Act of 1977 (15 U.S.C. §78).

⁹⁵ Loughman and Sibery, *supra*, p. 30.

⁹⁶ In the United States, B&CP violations are handled by the US Department of Justice (US DOJ) and the Securities and Exchange Commission (SEC); in the U.K., it is the United Kingdom Serious Fraud Office (UK SFO).

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warned that those worried about more aggressive anti-bribery enforcement “are right to be more concerned.”⁹⁷ In 2011, the director of the UK's SFO reiterated this enforcement trend:

"I have made it clear that the new extended jurisdiction in respect of foreign corporates is very important to the SFO. This creates a level playing field and enables us to support ethical U.K. corporates who have been undermined by foreign corporates who use bribery to obtain a business advantage... We intend to adopt an aggressive interpretation of the Act's jurisdictional reach."⁹⁸

Soon the numbers began to correspond with the warnings as FCPA enforcement actions went from a few in 2004 to over 70 in 2010.⁹⁹ Consequently, corporations again looked to international legal authorities for guidance on what constituted B&CP and what proactive measures could be taken to avoid violations.

Certain types of corporate misconduct can be conclusively revealed by referring to statutes, while other types must take into account "messy" factors such as *mens rea* or in the case of B&CP, local business culture. The standardization of antitrust compliance was aided by the near universal implementation of detailed laws prohibiting anticompetitive conduct and defining what that consisted of in minutiae. Ethics and culture are not universally consistent and thus difficult to factor into a universally applicable legal framework, let alone a compliance program. While the antitrust compliance literature published by international agencies such as the United Nations (UN) and the International Chamber of Commerce (ICC) celebrated the "technical," "practical," and "implementable" attributes of their work, the B&CP compliance sector must sort through a series of principles devoid of suggestions for a unified B&CP compliance program. There is also a distinct lack of resources aimed specifically at corporations, with most B&CP material directed at states. In a 1997 resolution, the Council of Europe issued *The Twenty Guiding Principles for the Fight Against Corruption* which included such vague guidelines as "ensur[e] the independence and autonomy of those fighting corruption."¹⁰⁰ Similar vagaries are found in the 2006 *African Convention on Preventing and Combating Corruption*

⁹⁷ Loughman and Sibery, supra, p. 5.

⁹⁸ *Ibid.*, p. 30.

⁹⁹ *Ibid.*, p. 5.

¹⁰⁰ Julio Bacio Terracino, The International Legal Framework against Corruption p. 63 (2012).

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ratified by a majority of African nations.¹⁰¹ The Organization of American States has issued several resolutions on the topic, most notably the *Inter-American Convention against Corruption* but is characterized by its attention to reactive rather than preventive measures important for compliance departments. Even the United Nations had difficulty framing prescriptive policies against corruption "as action...was overshadowed by the antagonism [over definitions of corruption] between the northern and southern blocks."¹⁰² The business-friendly OECD however, not only drafted the *OECD Convention on Bribery* but made influential recommendations that directly affected the way corporations conducted business in light of B&CP legislation:

The 2009 Recommendation of the Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions...succeeds the 1996 Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials. As indicated earlier, the issue of tax deductibility of transnational bribes undermines fair competition in international markets. While American corporations, due to the existence of the FCPA, could not partake in bribery in their business dealings abroad, European corporations could not only do so legally (as it was not criminalized in their countries), but could also claim tax deduction in their countries for the expenses incurred when bribing foreign officials.¹⁰³

Shortly after the release of these recommendations, the OECD Member States¹⁰⁴ who had allowed these deductions, and thus encouraged corporate corruption via their fiscal subsidies of the practice, effectively closed this tax loophole.¹⁰⁵ What can be concluded is that while there is a lack of resources dedicated to practicable measures for B&CP compliance, there has been at least an effort to create a global legal environment that is hostile to the practice.

However, the local business culture is a factor that directly affects how hostile a particular jurisdiction is to BC&P and what kind of compliance programs

¹⁰¹ Jon Jordan, [The Need for a Comprehensive International Foreign Bribery Compliance Program, Converting A to Z, in an Expanding Global Anti-Bribery Environment](#), 117 Penn St. L. Rev.89, p. 102 (2012).

¹⁰² Terracino, [supra](#), p. 57.

¹⁰³ [Ibid.](#), p. 65.

¹⁰⁴ Surprisingly, the list of countries that allowed tax deductibility are very prominent members of the global marketplace: Australia, Austria, Belgium, Denmark, France, Germany, Luxembourg, Netherlands, New Zealand, Norway, Netherlands, Sweden, Switzerland, and the United Kingdom.

¹⁰⁵ Mark Pieth, Lucinda A. Low et al., [The OECD Convention on Bribery: A Commentary](#) p. 539 (2007).

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can be most effectively implemented. If one examines the B&CP legislation in China for example, it will reveal that it is in line with the international legal standards discussed above:

"China's legislation on commercial bribery prohibits the use of money, goods, or other means to bribe a commercial unit or its individual for the purpose of selling or purchasing commodities. The term "other means" includes the providing of tours and visits inside or outside China under the pretext of travel or study. The legislation also considers offering secret off-the-books rebates as the offering of a commercial bribe."¹⁰⁶

However, multinational corporate compliance departments have found it difficult to communicate the idea of "kickback" to Chinese employees because of the fifteen different definitions of the term in Chinese, none of which imply illegality.¹⁰⁷ Furthermore, business dealings in China are notorious for requiring expenditures on, "at a minimum...large banquet-like celebrations, attended by hundreds of individuals, complete with the exchange of gifts."¹⁰⁸ These anecdotes hopefully illuminate to what degree cultural considerations must be considered in the development of a B&CP compliance program and why patchwork, instead of universal, compliance programs appear to be the norm within the B&CP sector. As the prominence of Asian corporations rises and the West continues to have difficulties grasping the cultural nuances of its business culture, Asian organizations are beginning to develop B&CP compliance mechanisms unique to their business landscape. The Asian Development Bank (ADB), in association with the OECD, has developed an action plan entitled the *ADB/OECD Anti-Corruption Initiative for Asia-Pacific* that has set out standards and practical "sustainable safeguards against corruption in the economic, political and social spheres of the countries in the region...".¹⁰⁹ This idea of B&CP compliance specialization has still not overcome the predominating call for effective compliance procedures in an international anti-bribery environment, it

¹⁰⁶ Kaplan and Murphy, Compliance and Ethics Program in China, *supra*, p. 21A-19.

¹⁰⁷ Travis P. Nelson and Frank C. Razzano, The expanding criminalization of transnational bribery: global prosecution necessitates global compliance, 42 *Int'l Law* 1259, p. 1283 (2008).

¹⁰⁸ Mike Koehler, The unique FCPA compliance challenges of doing business in China,

25 *Wis. Int'l L.J.* 397, p. 417 (2007).

¹⁰⁹ Terracino, *supra*, p. 69.

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being that regardless of local business culture, multinationals are still vulnerable to B&CP legislation from places beyond their immediate consideration.

As indicated by the prior statistics, multinational corporations have only met serious legal problems under the FCPA, rendering compliance with it the *de facto* international B&CP standard. A useful starting point for compliance departments would be to "get inside the mind" of the FCPA enforcement authorities, a task that has been facilitated by a Deloitte report on a 2012 US DOJ/SEC FCPA guide entitled the *New FCPA Resource Guide: Ten Things for Legal and Compliance Officers to Consider*. This guide aids companies by highlighting the specific conduct that compliance departments should focus upon in their compliance initiatives. A selection of the most telling follows:

1. The most critical way to defend against FCPA exposure is a preexisting compliance program that is risk-tailored and risk-based.
2. In the eyes of a regulator, the tone at the middle and tone at the bottom of a company will define the effectiveness of the tone at the top.
3. FCPA compliance is the responsibility of a senior executive who must work to ensure adequate staffing and resources.
6. Even non-controlled affiliates, joint ventures, distributors, and dealers should be included in the risk assessment and compliance plan.
8. The ultimate test for an FCPA compliance program is "Does it work?" Companies must be prepared to prove that it does.¹¹⁰

The report also emphasized that compliance departments do their due diligence for their particular industry by noting what US DOJ/SEC authorities consider "red flags" when selecting a company to investigate.¹¹¹ Some of the more important "red flags"

¹¹⁰Robert T. Biskup et al., Deloitte's New FCPA Resource Guide: Ten things for legal and compliance officers to consider p.3 (2012). Available at: http://www.deloitte.com/assets/DcomUnitedStates/Local%20Assets/Documents/DeloitteForensicCenter/us_dfc_new_fcpa_resource_guide_screen-friendly_012413.pdf.

¹¹¹ This is especially true as the FCPA has a history of dedicating special scrutiny to particular industries: in the past decade, defence, oil & gas, and pharmaceuticals have been prime targets. Lately, this scrutiny has been shifted to the financial sector (i.e. banks and brokerage firms) as the formerly targeted industries "have responded to the well-publicized deficiencies in their programs with reforms and increased emphasis on clearly written programs and policies coupled with aggressive and comprehensive training." Enforcement eyes increasingly are trained on new business sectors that operate in corrupt markets that have not felt the pressure to attend to their FCPA or anti-bribery compliance operations. *From: Robertson Park and Timothy P. Peterson, Regulatory: Federal agencies target new industries for FCPA enforcement, Inside Counsel, (June 12, 2013). Available at:*

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involve the local business culture, as a country's rank on Transparency International's Corruption Perception Index can "assist attorneys in evaluating perceived FCPA risks for a potential transaction."¹¹² Beyond a simple country assessment, compliance departments should look at the nature of the business in the countries in which the corporation operates because certain business structures attract more US DOJ/SEC attention: heavy use of "agents, distributors or other dealers" and reliance on "consultants and other third parties" may "signify an increased opportunity for corruption since these third parties are outside of the target's direct control."¹¹³ Last, a corporation's intended clients are as important as the agents they use to conduct business:

If the target has government or government-owned customers or otherwise substantially interacts with government officials, the risk of an FCPA violation may be high. Additionally, if the target's business requires government licenses or approvals, or interaction with customs, police, or military officials, the FCPA risk may be significant.¹¹⁴

Having a sound understanding of these red flags and how authorities interpret certain corporate operations will aid compliance departments in the implementation of effective compliance mechanisms.

Implementable mechanisms for an effective B&CP compliance program under the FCPA standard are extensive, purposefully methodical, and intended to create a large body of evidence supporting good corporate conduct. The simplest mechanism is the utilization of "check the box" type procedures for corporate employees, such as certification requirements that check for understanding of FCPA policy and awareness of violations by any company personnel.¹¹⁵ Of a more binding nature is compliance department evaluation of company contracts, an instrument usually under exclusive control of the legal department:

As discussed earlier, due diligence should be performed with respect to

<http://www.insidecounsel.com/2013/06/12/regulatory-federal-agencies-target-new-industries>.

¹¹² Martin J. Weinstein, The world of international compliance: what transactional lawyers need to know to perform ethically and responsibly, 29 Hous. J. Int'l L. 311, p. 322 (2006).

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ Daniel L. Goelzer, Designing an FCPA compliance program: minimizing the risks of improper foreign payments, 8 Nw. J. Int'l L. & Bus. 282, p. 302 (1997).

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foreign agents, and such persons may be required to execute contracts obligating them to comply with FCPA and company policies concerning payments to foreign officials. Files should be maintained documenting compliance with these requirements with respect to each foreign agent or other person covered by the policy that is retained, and these files should be reviewed periodically for completeness and conformity to the policy.¹¹⁶

Another idea would be to change the focus of traditional compliance measures, such as monitoring, from being quantitative in nature (i.e. number of transactions, amount of monetary exchanges) to more qualitative in nature by paying closer attention to supporting documentation and written reports of these quantitative transactions.¹¹⁷ A compliance mechanism that is becoming more common is to do actual face-to-face interviews with employees in FCPA-vulnerable areas within the corporation's ambit:

Periodic visits to foreign operations by internal auditors or staff members with compliance responsibilities may include interviews with local personnel during which such personnel are questioned concerning the existence of any circumstances suggesting FCPA violations.

The combined use of these compliance mechanisms are powerful in negating B&CP violations that are being aggressively enforced on the world stage by the US DOJ and the UK SFO. The difficulty for corporations lies in the establishment of an effective B&CP compliance program that can be translatable to different business environments where local practice can substantially stray from the *de facto* global standards.

While antitrust compliance has seen a global normalization of laws that led to its compliance programs following in the same vein, Bribery & Corrupt Practices laws did not have a similar trajectory. This contrast highlights the fact that while multinational corporations may be aware of the international compliance issues facing them, it is not enough to assume that they can be addressed formulaically as "international issues." Compliance regimes on the international level are subject to the same frailties of classic international law: cultural receptivity and interpretation.

¹¹⁶ Ibid., p. 301.

¹¹⁷ Ibid.

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The previous chapters discuss legal compliance issues that are applicable to a multitude of corporations operating in an international setting—for example, technology, telecommunication, and pharmaceutical corporations must all give ample consideration to the prior compliance discussion. To fully illustrate how legal compliance works within a company from "start to finish", it is useful to elect a particular sector, a particular set of laws and its corresponding compliance program. This chapter follows the complete trajectory of a legal compliance regimen in the multinational banking sector, specifically in regards to anti-money laundering compliance (henceforth, "AML Compliance"). The rapidly expanding world of AML Compliance clearly illuminates the complexity of internationally oriented compliance regimes because of its host of interplaying stakeholders (clients, banks, governments), the involvement of both the legal and black market, and the jurisdictional variance in legal ramifications for being connected to laundered capital. After a short introduction on the subject of money laundering, the details of how multinational banks implement an effective AML compliance program¹¹⁸ will ultimately serve as a representative example of a corporate legal compliance initiative.

Background on money laundering

The concept of money laundering is rooted in organized crime and its amassment of large amounts of capital from activities involving violence, intimidation, corruption, large-scale theft and drug trafficking.¹¹⁹ Due to the size of these illegally-made profits, organized crime needed to establish a mechanism to divert attention from the origin of their bounty: in the 1920s, as the first such mechanism, American criminal organizations operated cash-intensive laundromats to

¹¹⁸ While elements of an effective compliance program have been discussed in previous chapters, it is useful to have them distilled into the following seven steps: (1) Leadership, accountability, structure (2) Written standards (3) Education and Training (4) Auditing and Monitoring (5) Reporting (6) Enforcement and Discipline (7) Response and Prevention,

From: Merck, Compliance: Being an ethical company is about much more than simply adhering to the letter of the law—but that's an important step, Available at: <http://www.merckresponsibility.com/focus-areas/ethics-transparency/compliance/>.

¹¹⁹ Guy Stessens, Money Laundering: A New International Law Enforcement Model p.6 (2000).

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legitimize funds, a fact that explains the etymology of money laundering.¹²⁰ For decades, money laundering was closely associated to organized crime but its scope has widened to include tax evaders and most recently, terrorists. What all parties have in common is a desire to transform or conceal assets¹²¹ that were knowingly derived from illegal activities (or other related offenses) for their personal use.

Money laundering has understandably become more sophisticated since the era of laundromat schemes and can be effectuated using a range of techniques. The most common follow:

- Investing the dirty money in legitimate businesses, either through shell companies or through genuine companies using pseudonyms.
- Where the launderer acquires assets from the proceeds of crimes.
- Depositing of money in banks in non-cooperative countries and remittances through banking channels in the host country
- Use of non-banking channels to transfer money (such as hawala and hundi)
- Over-invoicing of goods in seemingly normal business transactions.
- Routing money through tax haven countries--the Cayman Islands and other Caribbean territories have been very prominent in this respect.¹²²

In light of these common techniques, money-laundering experts have created a three-part framework outlining the general route of illegal assets: placement, layering and integration. Placement involves the physical disposal of funds into the financial system. Layering is the attempt to create layers of financial transactions to distance and disguise the funds from their criminal sources. Integration, the final stage, is the reintroduction of funds into the economy in such a way that it looks to be derived from a legitimate source. Through this series of financial distortions, crime literally "pays off" for money launderers.

Preventing criminals from amassing money is not the only motivation for AML policy makers; money laundering has less obvious, but still significant,

¹²⁰ Norman Mugarura. The Global Anti-Money Laundering Regulatory Landscape in Less Developed Countries p. 2 (2012).

¹²¹ Assets covered by anti-money laundering legislation are not limited to transactions involving coin or paper money. A range of assets are touched by the law: traveller's checks, cashier's checks, money orders, promissory notes, securities in bearer form and other "monetary instruments." Proceeds derived from transactions involving the prior list of assets are also within the scope of AML provisions. *From: Wolters Kluwer Federal Money Laundering Regulation: Banking, Securities, and Compliance* (2013).

¹²² Mugarura, supra, p. 9.

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impacts on society in general. In distorting the amount of money circulating within the economy, political institutions cannot make accurate economic policy for their nations.¹²³ "Money laundering leads to volatility in exchange rates and interest rates due to unanticipated inflows and outflows of capital."¹²⁴ For financial institutions, specifically banks, large amounts of laundered funds can impact solvability and liquidity, hence compromising bank soundness.¹²⁵ It is the threat money laundering poses to stable economic growth, legitimate business operations and sound financial institutions that propels the attention given to it within legal frameworks worldwide.

Effective AML Compliance Program

The first step to the implementation of any compliance program is compliance officer familiarity with the relevant legal framework for their sector. Three basic laws and regulations govern the AML legal framework: the Money Laundering Control Act, the Bank Secrecy Act, and the Office of Foreign Assets Control, Specially Designated Nationals List. There are both criminal and regulatory provisions, the latter of which is of primary concern to compliance departments as they outline the preventive measures financial institutions are obligated to put into place under the law.

The criminal arm of the AML legal framework is the Money Laundering Control Act of 1986 (18 USC 1956). "It prohibits a person from engaging in a financial transaction with the proceeds of 'specified unlawful activity' with the intent to promote the carrying on of that activity or with knowledge that the transaction is designed to conceal or disguise the proceeds or circumvent reporting requirements."¹²⁶ Furthermore, it is an all encompassing statute, making it unlawful for a person to engage in a monetary transaction that he or she knows even merely "involves" criminally derived property.¹²⁷ Just as large as what entails illegal conduct is the category of persons the statute is applicable to: the Money Laundering Control Act applies to all persons and businesses in the United States and parallel entities

¹²³ Dr. Brigitte Unger et al., The Amounts and the Effects of Money Laundering, p. 91 (2006).

¹²⁴ *Ibid.*, p. 89.

¹²⁵ *Ibid.*, p. 91.

¹²⁶ Wolters Kluwer, *supra*, p. 17.

¹²⁷ *Ibid.*

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outside US borders should part of illegal transactions take place in American territory. The wording of the statute is deceptively simple:

If a person or business...

- (1) knows money or property comes from
- (2) some illegal activity, and the person or business
- (3) engages in a transaction with it, then
- (4) that person or business is a money launderer¹²⁸

Compliance departments must go further into the meaning of the statute by looking at how it has been interpreted by the U.S. court system. For example, courts have interpreted "knows" to include wilful blindness, where an offender has ignored certain red flags that indicate money came from an illegal source.¹²⁹ Another example involves the term "some", which courts have consistently interpreted as "any" criminal activity, even if an offender does not know what that activity is.¹³⁰ The number and range of monetary transactions that banks enter into put them at risk for criminal charges under the above statute, but this risk can be averted if the regulatory arm of the AML legal framework is duly respected.

"A regime, whose objective is to combat money laundering, must, by necessity, weaken the right to financial privacy."¹³¹ To ensure the practical implementation of the Money Laundering Control Act, the Bank Secrecy Act (BSA) requires banks and other financial institutions¹³² to retain records and file reports concerning certain financial transactions¹³³, including, those surpassing \$10,000

¹²⁸ The Money Laundering Control Act of 1986 (USA), 18 USC § 1956.

¹²⁹ Greg Baldwin, AML Compliance Officer Training, Slide 27 (2008).

¹³⁰ *Ibid.*

¹³¹ Bruce Zagaris and Sheila M. Castilla, Constructing an International Financial Enforcement Subregime: The Implementation of Anti-Money-Laundering Policy, 19 *Brook. J. Int'l L.* 871, p. 909 (1993).

¹³² There are 24 entities that constitute financial institutions apart from banks; they include mutual funds, insurance companies and even dealers in precious stones, metals or jewels.

From: US Code of Federal Regulations, Title 31, Money and Finance: Financial Record Keeping and Reporting of Currency and Foreign Transactions (31 CFR 103.140).

¹³³ There is a copious list of transactions compliance departments must monitor other than inflows/outflows of capital. There are compliance obligations related to the following financial services: financial leasing, money transmission services, issuing/administering means of payment (e.g. credit cards, travellers' checks and bankers' drafts), guarantees and commitments, trading in money market instruments,

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and/or those involving cross-border transportation of an equal amount.¹³⁴ Relevant to banking compliance departments are the five regulatory requirements included in this act. These include (1) a written AML program (2) procedures in place to "Know Your Customer" (3) holding periodic employee training and audits (4) training to identify and react to suspicious activity and (5) checking the Office of Foreign Assets Control, Specially Designated Nationals List.¹³⁵ Note that the five requirements follow the general elements of an effective compliance program prescribed by experts, as per Footnote 118.

The second provision of the regulatory requirements—the "know your customer principle" (KYC)—is the most fundamental to AML compliance procedures. The KYC obligation should not be viewed as a mere bureaucratic requirement, but rather as an important means to identifying activity that could lead to a bank being suspected of involvement in money laundering. KYC compliance procedures are investigatory in nature and meant to establish a customer's identity and his corresponding means of earning income. These procedures arise in three broad circumstances:

- (1) Where a customer will become a regular or habitual client and the service provided will not be a "one off." The most obvious example is that of the person who wants to open a bank account. In all such cases, the onus will be on the bank to establish the identity of the person for whom it proposes to provide banking services.
- (2) Where there is reason to believe, or where it is known, that the customer is not acting on his own behalf, then "reasonable measures" must be taken to establish the identity of the third party for whom that person is acting.
- (3) Where a bank provides service of a kind mentioned in [Footnote 134]¹³⁶

Under each of these circumstances, there are separate steps that prescribe what kind of documentation is acceptable for verification, describe non-documentary methods for verifying identification, and guide compliance officers in those situations where verification cannot be accomplished.¹³⁷ Above, it was noted that checking the Office

foreign exchange, financial futures and options, transferable securities), money broking, portfolio management and advice amongst others.

From: Michael Ashe and Paula Reid, Money Laundering: Risks and Liabilities, "Compliance" p.57 (2006).

¹³⁴ The Bank Secrecy Act of 1970 (USA), 31 USC § 5311–5330.

¹³⁵ Known colloquially as the "terrorist list."

¹³⁶ Ashe and Reid, *supra*, p. 61.

¹³⁷ Baldwin, *supra*, Slide 35.

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of Foreign Assets Control, Specially Designated Nationals List constituted an independent provision under the BSA, but it is a critical first step in the KYC process. The SDN List names the people and entities that are prohibited from transferring assets without OFAC authorization.¹³⁸ A more helpful list to compliance departments is the OFAC "Grey List" that contains the names of people or entities that *may* be put on the SDN List in the future and thus alerts banks to potential problem areas or customers.¹³⁹ Neglecting to check these frequently updated lists can put financial institutions at risk for civil penalties of up to \$100,000 and criminal penalties that could include 10-year prison terms.¹⁴⁰

Provisions three and four of the BSA regulatory requirements can be combined under the category of employee training. A core part of the duties of a compliance department is to ensure that all members of the organization understand their duties under the laws pertaining to their industry. Moreover, the AML Compliance team itself should also undergo periodic scrutiny and retraining as necessary via the use of independent auditors. For AML compliance, the most important training program is that designed to arm compliance employees with the skills needed to identify "suspicious activity" amongst a financial institution's client base. To qualify as "suspicious activity" a transaction must show signs of a violation of a federal law or regulation, signs of terrorist financing, or one that appears to have no legitimate or reasonable business purpose.¹⁴¹ Many government agencies have compiled lists of "red flags" to which banks can refer in order to determine potentially suspicious activity. These lists consists of hundreds of "red flags," what follows is a selection from the principal "suspicious activities" headings:

Customers Who Provide Insufficient or Suspicious Information

- A customer uses unusual or suspicious identification documents that cannot be readily verified.
- A customer provides an individual tax identification number after having previously used a Social Security number.

¹³⁸ Matthew H. Wenig, Exporting U.S. Products, Services and Technologies: An Overview of the Regulations and Considerations Regarding Compliance Programs, 23 Denv. J. Int'l L. & Pol'y 569, p. 577 (1995).

¹³⁹ Ibid., p. 578.

¹⁴⁰ Baldwin, supra, Slide 54.

¹⁴¹ Bank Secrecy Act/Anti-Money Laundering InfoBase, Appendix F: Money Laundering and Terrorist Financing "Red Flags", Available at: http://www.ffiec.gov/bsa_aml_infobase/pages_manual/OLM_106.htm.

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- A customer uses different tax identification numbers with variations of his or her name.
Efforts to Avoid Reporting or Recordkeeping Requirement
- A customer or group tries to persuade a bank employee not to file required reports or maintain required records.
- A customer is reluctant to provide information needed to file a mandatory report, to have the report filed, or to proceed with a transaction after being informed that the report must be filed.
- A customer is reluctant to furnish identification when purchasing negotiable instruments in recordable amounts.
- A business or customer asks to be exempted from reporting or recordkeeping requirements.
Funds Transfers
- Many funds transfers are sent in large, round dollar, hundred dollar, or thousand dollar amounts.
- Funds transfer activity occurs to or from a financial secrecy haven, or to or from a higher-risk geographic location without an apparent business reason or when the activity is inconsistent with the customer's business or history.
- Many small, incoming transfers of funds are received, or deposits are made using checks and money orders. Almost immediately, all or most of the transfers or deposits are wired to another city or country in a manner inconsistent with the customer's business or history.
Activity Inconsistent with the Customer's Business
- The currency transaction patterns of a business show a sudden change inconsistent with normal activities.
- A large volume of cashier's checks, money orders, or funds transfers is deposited into, or purchased through, an account when the nature of the accountholder's business would not appear to justify such activity.
- A retail business has dramatically different patterns of currency deposits from similar businesses in the same general location.¹⁴²

AML Compliance officers must be trained to recognize the increasingly sophisticated manifestations of the above signs of money laundering. The Internet age has ushered in new complications for AML Compliance as money-laundering offenders take advantage of "identity masking features" that make it more difficult to red flag illegal financial transactions.¹⁴³ This fact, in combination with the notoriously difficult to navigate webs of communication between legal and financial institutions, are undermining AML Compliance efforts and requiring the creation of more dynamic processes to keep pace with modern money laundering practices.

Once an AML compliance officer understands how to identify "suspicious activity", they should be trained to respond to such activity in an inquisitorial and non-accusatory manner. The standard for reporting suspicious activity is if a

¹⁴² Ibid.

¹⁴³ Stephen Jeffrey Weaver, Modern Day Money Laundering: Does the Solution Exist in an Expansive System of Monitoring and Record Keeping Regulations, 24 Ann. Rev. Banking & Fin. L. 443, p. 444 (2005).

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compliance officer "knows, suspects or has reason to suspect," but at times, there do exist commercially reasonable explanations for certain transactions. A more in depth evaluation of the transaction could simply allow for it to proceed or could unearth information a bank would need to gather in the case that it has indeed facilitated an illegal transaction and would need to call upon federal "Safe Harbor" clauses releasing it from liability.¹⁴⁴ Any money laundering that is suspected to be related to terrorism activity should also be immediately reported to federal law enforcement authorities, notably the Financial Crimes Enforcement Network ("FinCEN") that is a unit within the US Treasury Department. An industry leading AML Compliance Department would also report any suspicious activity or proven illegal transaction to international authorities.

Cultivating a strong working relationship with international banking and AML authorities represents the last endeavour a banking compliance department may wish to pursue. The best-performing AML Compliance Departments support and contribute to the Basle Committee on Banking Regulations and Supervisory Practices and the premiere international organization, the Financial Action Task Force (FATF). As the only organization dedicated solely to the fight against money laundering, it is the nucleus of all issues related to AML and has representatives from 26 governments representing the world's financial centres.¹⁴⁵ The FATF has also led to the creation of several satellite organizations that focus on money laundering in a particular region, such as the Caribbean FATF and the Asia-Pacific Group on Money Laundering.¹⁴⁶ Apart from creating AML policy recommendations and promoting "name and shame" publications of the most egregious money

¹⁴⁴ IN GENERAL.--Any financial institution that makes a voluntary disclosure of any possible violation of law or regulation to a government agency or makes a disclosure pursuant to this subsection or any other authority, and any director, officer, employee, or agent of such institution who makes, or requires another to make any such disclosure, shall not be liable to any person under any law or regulation of the United States, any constitution, law, or regulation of any State or political subdivision of any State, or under any contract or other legally enforceable agreement (including any arbitration agreement), for such disclosure or for any failure to provide notice of such disclosure to the person who is the subject of such disclosure or any other person identified in the disclosure. *From: Safe Harbor, 31 USC 5318(g)(3).*

¹⁴⁵ Peter Alldridge, Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime p. 104 (2003).

¹⁴⁶ *Ibid.*, p. 105.

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laundering entities, the FATF holds a wealth of information that can help banks piece together client identities and monitor money laundering trends on a global scale. The FATF's most important contribution to banks and their compliance departments is the Non-Cooperative Countries and Territories Initiative which is pushing for the development of global norms in AML regimes. The FATF, through an international consensus-based initiative, passed forty recommendations regarding AML norms and established penalties for those countries/entities who do not adhere to or undermine these recommendations. In identifying problem countries and entities, banks have been able to better target what transactions to identify and what localities require heightened scrutiny.

An effective AML Compliance program should seek to familiarize itself with relevant AML legislation and regulations, implement comprehensive "Know Your Customer" procedures and ensure that all compliance officers are properly trained in identifying money laundering "red flags" and the prudent way to respond to them. Preventive measures cannot only lie in the present, but should also seek to engage those AML organizations that set banking industry standards and hold invaluable information that could shape the dynamic process that is a compliance program within a global financial institution.

Chapter 4 Case Study in Legal Compliance: Siemens, AG

Having now explored several topics in legal compliance, it is useful to demonstrate how one such topic has played out in the modern business world on an international level. This chapter will provide a summary of the serious Bribery and Corrupt Practices compliance troubles experienced by the German electronics and electrical engineering company, Siemens, AG. This case study will not only chart the facts, but highlight the egregious way that Siemens, AG upper management undermined even the most basic of compliance principles and efforts made by their compliance departments.

Background: Siemens, AG

Siemens, AG is the largest European electronics and electrical engineering company, currently valued at over 90 billion dollars.¹⁴⁷ Founded in Germany in 1847 by Werner von Siemens, its first success came from its installation of sophisticated telegraphs, first within Germany and then expanding to the major markets of the United Kingdom and Russia.¹⁴⁸ Soon, the company was dominating modernization efforts by European capital cities with its street lighting, electric trains and light bulbs.¹⁴⁹ Bypassing those noxious business practices that saw Siemens, AG through the World Wars, the 1950s marked the period where the company began manufacturing computers, semi-conductors devices, washing machines, and even pacemakers.¹⁵⁰ Today, while still maintaining a solid manufacturing division, Siemens, AG is a global leader in telecommunications, industrial transportation and energy production.

Context of Siemens, AG Compliance Troubles

Siemens, AG's compliance problems stemmed from their efforts to expand out of Europe and into the developing markets across the globe. The opening of the 21st century was a period of incredible growth in these markets and the opportunity

¹⁴⁷ Forbes Company Profiles, Siemens, AG, Available at: <http://www.forbes.com/companies/siemens/>.

¹⁴⁸ Siemens, AG, History: Milestones in the development of the company and technology, Available at: <http://www.siemens.com/history/en/history/index.htm>.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

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to win government contracts for infrastructure was at an all time high.¹⁵¹ What was at stake were billion dollar contracts to complete the following:

"...to design and build metro transit lines in Venezuela; metro trains and signaling devices in China; power plants in Israel; high voltage transmission lines in China; mobile telephone networks in Bangladesh; telecommunications projects in Nigeria; national identity cards in Argentina; medical devices in Vietnam, China and Russia; traffic control systems in Russia; refineries in Mexico; and mobile communications networks in Vietnam."¹⁵²

In order to gain a competitive advantage in the bidding process for these contracts, Siemens, AG officials took advantage of "opaque tendering procedures and poor governance"¹⁵³ characteristic to the developing world governments by systematically offering bribes to become an insider, and thus preferred, firm. Bribery was seen as a tempting short cut to reach performance targets established by an especially aggressive Siemens, AG growth strategy.¹⁵⁴ The use of bribes became endemic within the Siemens, AG culture,¹⁵⁵ especially from the mid-1990s until 2006 when German and American authorities opened a bribery and corrupt practices investigation into the corporation.¹⁵⁶

Claims against Siemens, AG

Siemens, AG were investigated by both German¹⁵⁷ and American authorities. This section will concentrate on the United States Department of Justice inquiry into the bribery and corrupt practices claims brought against the corporation.

¹⁵¹ Simon. G. Evenett, Can developing countries benefit from negotiations on transparency in government procurement in the Doha Round?, Task Force 9 (Open, Rule-Based Trading System) of the United Nations Millennium Project (2005).

¹⁵² Alexandra Wrage and Anne Richardson, Siemens AG, Violations of the Foreign Corrupt Practices Act, 48 ILM 232, p. 234 (2009).

¹⁵³ Evenett, supra, p.3.

¹⁵⁴ Graham Dietz and Nicole Gillespie, The Recovery of Trust: Case studies of organisational failures and trust repair, Institute of Business Ethics, p.9 (2012).

¹⁵⁵ "Bribery was Siemens's business model," said Uwe Dolata, the spokesman for the association of federal criminal investigators in Germany. "Siemens had institutionalized corruption." *From*: Siri Schubert and T. Christian Miller, At Siemens, Bribery Was Just a Line Item, N.Y. Times, December 20, 2008.

¹⁵⁶ Ibid.

¹⁵⁷ The Munich Public Prosecutor's corruption probe into Siemens, AG resulted in the corporation paying a settlement of USD 569 million, USD 145.3 million in profit disgorgement and USD 125,000 in administrative penalties. *From*: Lawrence J.

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Case Study in Legal Compliance: Siemens, AG

In 2008, in a Washington, D.C. federal district court, Siemens, AG pleaded guilty to having violated the Foreign Corrupt Practices Act--Internal Controls and Books and Records Provisions.¹⁵⁸ The Department of Justice Statement of Offense against Siemens, AG is a laundry list of instances where the company planned for, executed, and disguised the payment of bribes to foreign officials in order to win large infrastructure contracts. With blessings from the executive management, Siemens, AG constructed a matrix of independent companies and subsidiaries to carry out these payments and avoid discovery by authorities. The most notorious example of one such matrix was that created to win a contract to execute the United Nations' Oil for Food Program (OFFP) in Iraq:

25. Siemens S.A.S. of France ("Siemens France"), SIEMENS' regional company in France, entered into contracts for power station renovation, servicing, and spare parts, with the Iraqi government in connection with the United Nations Oil for Food Program. All of Siemens France's contracts under the United Nations Oil for Food Program (the "OFFP") were entered into in partnership with artificial subsidiaries.

26. Siemens Sanayi ve Ticaret A.S. of Turkey ("Siemens Turkey"), SIEMENS' regional company in Turkey, sold power and electrical equipment to the Iraqi government in connection with the OFFP.

27. Osram Middle East FZE ("Osram Middle East") was the United Arab Emirates based subsidiary of Osram GmbH, which was a wholly-owned subsidiary of SIEMENS. Osram Middle East sold light bulbs and lighting equipment to the Iraqi government in connection with the OFFP.

28. Gas Turbine Technologies S.p.A. ("GTT"), an Italian subsidiary of SIEMENS, contracted to sell gas turbines to the Iraqi government in connection with the OFFP.

29. "OFFP Agent A," a Paraguayan company registered in Jordan, acted as an agent for Siemens France and Siemens Turkey in connection with sales to the Iraqi government made through the OFFP.

30. "OFFP Agent B," an Iraqi citizen, acted as an agent for Osram Middle East in connection with sales to the Iraqi government made through the OFFP.¹⁵⁹

By using shell organizations in jurisdictions with weak rules on bribery, Siemens was able to transfer huge sums of money into foreign accounts specifically marked to be used for the bribery of Iraqi officials who chose the OFFP contractors.

Siemens, AG project cost calculation sheets

sometimes reflected "nützliche aufwendungen" ("NAs"), a common tax term literally

Trautman, The Foreign Corrupt Practices Act: A Minefield for Directors, 6 Va. L. & Bus. Rev. 145, p.165 (2011).

¹⁵⁸ 15 U.S.C. §§78m(b)(2), 78(b)(5), and 78ff(a).

¹⁵⁹ US DOJ Siemens, Statement of Offense, p. 3 (2008).

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translated as "useful expenditures" but partly understood by many employees to mean "bribes."¹⁶⁰ The totality of Siemens, AG bribery funds was calculated to approximately \$1,360,000,000, the highest amount ever identified as bribe payments in a legal proceeding.¹⁶¹ Through similar schemes¹⁶², Siemens, AG made exponentially more than the above sum in profits on their global contracts.

While Siemens, AG had a compliance department, it was intentionally undermined through underfunding and marginalization by executive management. In their Statement of Offense, the corporation accepted the US DOJ claim that it "knowingly failed to establish a sufficiently empowered and competent Corporate Compliance Office."¹⁶³ Siemens, AG had a compliance department consisting of several lawyers, but they were encouraged to eschew their compliance duties and instead focus on defending the company against outside allegations unrelated to compliance.¹⁶⁴ Testimony from compliance personnel also revealed that they received minimal training or direction regarding their compliance responsibilities.¹⁶⁵ As a result, "Siemens routinely: (i) ignored red flags suggesting that improper payments were being made; (ii) failed to adequately investigate or follow up on the red flags; and (iii) failed to take disciplinary action against known wrongdoers."¹⁶⁶ Worse still, even the most superficial of compliance mechanisms was subverted by executive management, highlighting that Siemens, AG compliance troubles were symptomatic of a poor "tone at the top" of the organization.

Executive management was at odds with compliance department efforts to create a code of conduct which Siemens, AG would hold as an ethical standard for

¹⁶⁰ Ibid., p. 7.

¹⁶¹ Karl Sidhu, Anti-Corruption Compliance Standards in the Aftermath of the Siemens Scandal, 10 German L. J. 1343, p. 1345 (2009).

¹⁶² A last anecdote on the extent of Siemens, AG bribery schemes: Pools of money for corrupt payments were often approved with forms equipped with removable Post-It notes on the signature line, thereby concealing the identity of the signatories by removing the notes should the company be investigated. *From*: Trautman, supra, p. 165.

¹⁶³ US DOJ Statement of Offense, supra, p. 36.

¹⁶⁴ Ibid., p. 3.

¹⁶⁵ Foley & Lardner, LLP. FCPA Compliance Lessons from the Record-Setting Siemens Enforcement Action (2009), Available at: <http://www.foley.com/fcpa-compliance-lessons-from-the-record-setting-siemens-enforcement-action-01-09-2009/>.

¹⁶⁶ Ibid.

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its business operations. The US DOJ statement described an environment where senior management "provided few strong messages regarding business ethics, including no clear statements that the company would rather lose business than obtain it through bribery."¹⁶⁷ Under those circumstances, the compliance department drafted a code of conduct and distributed anti-corruption circulars throughout the organization but this so-called "paper program" was clearly not intended to make an impact on Siemens, AG business conduct on the ground. Referring back to the US Sentencing Guidelines discussed in Chapter 1, we recall specific mention of the uselessness of compliance programs that live up to the letter of ethical standards, but not the spirit of these last. The severity of the penalties Siemens, AG accepted at the conclusion of the US DOJ investigation reflects that the corporation lived up to neither word nor spirit.

Summary of penalties against Siemens, AG

As a result of the above compliance failures, Siemens, AG incurred fines of USD 1.34 billion.¹⁶⁸ Of note is the fact that this sum does not include the costs the company paid to conduct a comprehensive internal investigation as required by other US DOJ settlement stipulations. The internal investigation is estimated to have cost Siemens, AG another billion dollars:

- * 1.6 million billable hours logged by Siemens's Audit Committee counsel and the company's forensic auditor at a cost of over \$850 million;
- * 1,750 interviews and 800 informational meetings concerning the company's operations in 34 countries;
- * administration, with approval from DOJ and the SEC, of two employee amnesty programs, which led to 100 employees coming forward with useful information;
- * over 100 million documents preserved and 80 million documents stored in an electronic database at a cost to Siemens of more than \$100 million;
- * analysis of 38 million transactions from Siemens's "Finavigate" accounting system and a review of 127 million accounting records related to those transactions;
- * more than \$5.2 million in document translation costs; and
- * more than \$150 million spent on the creation of an anticorruption kit for 162 distinct operating entities, including six weeks of auditors "on the ground" at each of the fifty-six entities determined to be a "high risk."¹⁶⁹

¹⁶⁷ Ibid.

¹⁶⁸ See Appendix 1 for Siemens Sentencing Guidelines Calculations, *From: US DOJ Siemens Sentencing Memorandum*, p.12 (2008).

¹⁶⁹ Trautman, *supra*, p. 166.

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Moreover, Siemens, AG assisted investigators in prosecuting third parties who also formed part of the bribery matrix and was given special mention within the US DOJ Sentencing Memorandum for its overall cooperation with the investigation. Amongst other efforts, Siemens, AG announced a new commercial strategy that would result in a temporary reduction of its commercial ventures in corruption hotspots.¹⁷⁰ This effort was complemented by a Siemens, AG and World Bank initiative that would commit 15-years of support and USD 100 million to nonprofit organizations fighting corruption.¹⁷¹

Rebuilding a Culture of Compliance

In 2008, at the conclusion of the US DOJ investigation, Siemens, AG made dramatic changes to executive management and to its compliance department. The company began by cleaning house: by 2009, Siemens, AG shed 600 employees for compliance deficiencies and put 2200 others under investigation for possible violations.¹⁷² It then hired 500 full-time compliance officers worldwide (up from just 86 in 2006).¹⁷³ There was also a distinct change in the "tone at the top" of the organization that provided the support necessary to accomplish extraordinary results within a small window of time:

Siemens rolled out strict new rules and anti-corruption/compliance processes...by hiring a former Interpol official to head its new investigation unit. It also established compliance hotlines, and an external ombudsman based worldwide and online. It created a web portal for employees to evaluate risk in their client and supplier interactions.

In an attempt to change its internal culture, Siemens launched a comprehensive training and education programme on anti-corruption practises for its employees. By end 2009, Siemens had trained more than half its 400,000-strong global workforce on anti-corruption issues.¹⁷⁴

Last, Siemens, AG replaced its "matrix" payment system structures with a more streamlined one comprising only three divisions, limiting the number of areas

¹⁷⁰ Dietz and Gillespie, *supra*, p. 10.

¹⁷¹ *Ibid.*

¹⁷² Richard Weiss and Rajiv Sekhri, Siemens Fires Brazil Head After Finding Compliance Violation, Bloomberg BusinessWeek, October 11, 2011.

¹⁷³ Sidhu, *supra*, p. 1345.

¹⁷⁴ Graham Dietz and Nicole Gillespie, Rebuilding trust: How Siemens atoned for its sins, The Guardian UK, March 26, 2012.

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compliance officers would need to investigate should questionable financial transactions surface.¹⁷⁵ These changes catapulted Siemens, AG from a company marred by scandal to one serving as a model for other corporate compliance departments worldwide.¹⁷⁶ Today, Siemens, AG compliance department is often in the news for its ability to quickly detect and prevent corruption deals from taking place.¹⁷⁷

Conclusions

The Foreign and Corrupt Practices Act is an important piece of legislation that can result in severe financial and reputational penalties for a given corporation. For decades, Siemens, AG defied the ethical standards for business practice outlined in the statute, a decision that led to short-term profitability in global markets but ultimately led to a complete dismantling of the company. This case study serves to show that a response to compliance failures of such magnitude should be tackled concurrently on structural, procedural and cultural levels for maximum results.

¹⁷⁵ Ibid.

¹⁷⁶ One compliance mechanism invented by Siemens, AG responds to problems that arise with using independent business consultants: now, a new state-of-the-art system requires any employee who wishes to engage a business consultant to enter detailed information into an interactive computer system, which assesses the risk of the engagement and directs the request to the appropriate supervisors for review and approval. The US DOJ described this mechanism as highlighting "the serious commitment of Siemens to ensure that it operates in a transparent, honest, and responsible manner going forward." *From: US DOJ Sentencing Memorandum, supra*, p. 24.

¹⁷⁷ See Joe Palazzolo, Siemens Compliance Program Made The Catch, Company Says, The Wall Street Journal, June 10, 2011.

Chapter 5
Emerging Issues in Corporate Legal Compliance

While legal compliance is a dynamic field that garners the best results when compliance managers continually monitor and demonstrate sensitivity to the most current issues relevant to their field, there are some emerging compliance trends that could dramatically change the mechanics of corporate compliance departments. This chapter will discuss two trends that have elicited the most attention: the questionable necessity of implementing a corporate ombudsman office and the imperative of responding to the Internet's effect on compliance by developing an e-compliance division. The addition of a new corporate personality—i.e. the ombudsman—is touted by some as a welcome entity to alleviate the increasingly heavy burden of tasks allocated to the compliance department, a description that fuels opposing views that an ombudsman office is a redundancy. In contrast to the ombudsman discussion, is the consensus dominating the discourse on e-compliance: there must be a corporate compliance response to the dominance of the Internet and its related technologies. A short explanation of both issues follows.

Long a fixture in government administration, corporations are becoming more receptive to the idea of having a corporate ombudsman office to complement the work done by its compliance department. It is only in the last 25 to 30 years that private corporations have considered the benefits that an ombudsman office can bring to their operations.¹⁷⁸ While the role of an ombudsman is subject to slight variations depending upon the corporation, there are "several consistent characteristics of the ombuds office that include neutrality, independence, informality, and confidentiality."¹⁷⁹ A larger definition of the ombudsman is a person who acts as a "neutral or impartial manager within a corporation, who may provide confidential and informal assistance to managers and employees in resolving work related concerns, who may serve as a counselor, go-between, mediator, fact-finder, or upward feedback mechanism, and whose office is located outside ordinary line management structures."¹⁸⁰ Maintaining a separation from the management hierarchy

¹⁷⁸ Eds. Rob Gregory and Phillip James Giddings, Righting Wrongs: The Ombudsman in Six Continents p. 11 (2000).

¹⁷⁹ M. Rowe, Options, Functions and Skills: What an Organizational Ombudsperson Might Want to Know, 2 *Negotiation J.* 2, p. 7 (1995).

¹⁸⁰ Gregory and Giddings, supra, p. 13.

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is a key feature of the ombudsman office, however an ombudsman must still have access and support from upper management. In sum, the ombudsman office represents an informal entity that could extinguish issues that could later become large enough to warrant compliance department attention.

The informal quality of the ombudsman office has contributed to a dramatic drop in resource usage by compliance departments. In a first degree, corporations consistently bemoan the soaring monetary costs of compliance that are allocated to internal/external investigations, document review and storage, and corporate-wide training programs.¹⁸¹ A characteristic of the ombudsman office is that it does not maintain specific records of individuals or cases, nor does it conduct cumbersome investigations. In not maintaining such records, the ombudsman ensures that anonymous complaints/alerts remain such and cannot be retrieved later for retaliatory purposes elsewhere within the corporation. While the monetary savings are evident, there are also less tangible resource savings that are linked to having an ombudsman office. The informality of the office has been shown to encourage the reporting of incipient criminal, or even simply questionable, conduct by a corporation. Providing this less burdensome mechanism to report concerns signals that the corporation is not adverse to criticism and is committed to compliance with the law. The U.S. Sentencing Guidelines, mentioned prior, has indicated that the existence of a corporate ombudsman office positively affects the determination of the effectiveness of a compliance program during sanction mitigation hearings.¹⁸² Further, from a strategic viewpoint, a corporation would be wise to consider the value of the "ombudsman privilege." In this day of fast-moving information, should a corporate ombudsman office hear of a potentially devastating corporate fallibility and have it resolved quickly by the compliance department, there is no obligation for the ombudsman to publically report. While the attorney-client privilege has been loosened over the years, six federal district court decisions have protected the ombudsman privilege of complete confidentiality of their knowledge and activities

¹⁸¹ Pamela M. Green, The Cost Of Compliance, The Maine Banker, January 2013, Available at:

http://onlinedigeditions.com/display_article.php?id=1288332.

¹⁸² Banks, supra, p. 13-21.

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to parties in a lawsuit.¹⁸³ The ombudsman office could prove invaluable to the corporate public image.

In the least, a corporation can consider a lesser form of an ombudsman office: the board ombudsman. Instead of creating an entire office, the board ombudsman would represent a new and independent corporate personality that contributes to the traditional board of directors. Scholars suggest three core functions for this position:

- Communicating information to the conflicts board to provide useful feedback on the implementation of corporate policies and other matters relevant to the board's responsibility
- Serving as a safety net and early warning device for problems facing the corporation by providing an information outlet for whistleblowers
- Operating as a change agent through recommendations to the board on policies, actions and procedures¹⁸⁴

The most compelling function amongst the three is that of "change agent." Many contemporary compliance problems have arisen from executive misconduct and disregard of burgeoning problems. "An important reason for having a [board] ombudsman is to prevent unethical behavior. The ombudsman serves as the conscience of the organization and can alert management to growing concerns or festering problems...It is said that the 'ombudsman was created not to clean up a mess, but, rather...to provide insurance against further messes.'"¹⁸⁵ Having such an influence present during everyday board operations could clearly affect the culture of a corporation and aid the compliance department's efforts to cultivate a transparent organization.

Whereas the ombudsman office is viewed as a wise option for complementing a corporation's compliance department, the development of and attention given to e-compliance should be viewed as an imperative. E-compliance, an abbreviated form of electronic compliance denoting technology driven compliance, has arisen out of the Internet era. Even if one is not an "Internet" company, many corporate operations are conducted via services that are internet-

¹⁸³ B. Thompson, Corporate Ombudsmen and Privileged Communications: Should Employee Communication to Corporate Ombudsmen Be Entitled to Privilege?, 61 U. Cin. L. Rev. 653, p. 657 (2012).

¹⁸⁴ Banks, supra, p. 13-20.

¹⁸⁵ Brian Bloch and Nancy Erbe, The Organizational Ombudsman as Change Agent for Organizational and Social Capital, 3 J. Int'l Ombudsman Assn. 1, p. 3 (2010).

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based: banking, emailing, or even website development and maintenance. There is a false impression that passive behaviour such as having a company website would not require e-compliance services: "A website needs to comply with traditional advertising and trademark laws, but it must also comply with newly enacted laws concerned with access by children and/or privacy."¹⁸⁶ Active behaviour, such as having a corporate email network, can trigger corporate liability for creation of a hostile work environment as elucidated further here:

Employees may circulate offensive jokes or pictures, which can subject the company to liability for sexual harassment. Employees may think that because salacious material is freely available on the Internet, and "free speech" is indeed in the Constitution, they have every right to circulate this kind of material at work. Unfortunately, it may result in liability for a corporation...as sexual harassment laws will impose liability on a corporation for creation of a hostile work environment.¹⁸⁷

Apart from the preceding irresponsible behaviour, there is also the real risk that employees could inadvertently reveal company trade secrets or strategy through improper use or understanding of e-compliance policies. Compliance departments must walk a fine line in establishing guidelines and anticipating Internet behaviour: lacking an Internet usage policy is indeed harmful, but the overregulation of technology usage can stifle creativity and performance amongst employees, potentially diminishing a corporation's edge in the marketplace. Note that the last examples represent e-compliance risks emanating from within a corporation, but there are also risks that issue from the behaviour of external entities.

There are certain fields where e-compliance initiatives are primarily focused on the actions of the public. The largest of these fields is the music and entertainment industry where Internet use for advertising and product disbursement ties in with copyright and trademark infringement. Returning to a field discussed earlier in this paper, e-compliance in Securities Law is becoming widely accepted as SOX compels certain type of corporate information—such as insider trades—to be posted online for public consideration.¹⁸⁸ Within the banking sector, Anti-Money Laundering compliance has seen a drastic impact from client use of internet-based technologies and have significantly bolstered resources to e-compliance divisions. As noted in Chapter 3, the act of money laundering was a physical endeavour when

¹⁸⁶ Banks, *supra*, p. 9-3.

¹⁸⁷ Banks, *supra*, p. 9-14.

¹⁸⁸ SEC Release No. 33-7856, Use of Electronic Media (2008).

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gangsters used 'laundromats' to make their proceeds appear to come from a legitimate enterprise. With the rise of the Internet, money laundering is increasingly done using Internet tools such as electronic money and stored value cards, these instruments undermining transfer rules because of their ease of transfer without bank/financial institution intervention. The use of the Internet to commit money laundering is called "cyberlaundering" and has led to the rise of the AML e-compliance field.¹⁸⁹ The processes AML Compliance departments used in the past to determine client identity and source of income have now been complicated by technology:

Money launderers can use the Internet in a variety of ways: they can seamlessly transfer money to Internet banks, 33 they can use illegal Internet casinos as a mechanism to generate funds, 34 or they can even transfer electronic money to a private server which can be browsed by individuals using File Transfer Protocol ("FTP"). 35 In order to understand the complications cyberlaunderers can create for enforcement agencies, one must understand the concepts of electronic money, stored value cards, and encryption technology.¹⁹⁰

As more corporations utilize the Internet to conduct their daily operations and facilitate global business, e-Compliance divisions will need to be allocated the requisite resources to grapple with issues arising from the rapid pace of Internet-based technologies. Furthermore, legal compliance officers will inevitably require competency in not only law and business, but technology as well.

The rise of the corporate ombudsman and the necessity of e-compliance to the modern corporation represent only a few of the interesting emerging issues with the field of legal compliance. The dynamism of this field requires a certain level of openness from corporate management and reflects the how important reception to new ideas and processes is to the success of a modern corporation.

¹⁸⁹ Wendy J. Weimer, Note, Cyberlaundering: An International Cache for Microchip Money,

13 DePaul Bus. L. J. 199, 199 n.1 (2001).

¹⁹⁰ Weaver, supra, p. 449.

Conclusion

Once viewed as a subdivision of the traditional corporate in-house legal department, legal compliance is now given its due respect as a standalone department within the majority of corporations. This change was less an organic corporate development and more a response to United States' courts increased receptivity to arguments imposing corporate liability for misconduct. Initially, classic definitions of *respondeat superior* were expanded to the scope necessary to impose liability, creating a body of case law that proved disadvantageous to corporations. Later came a movement encouraging statutory provisions for corporate conduct, the two having the most impact being the Sarbanes-Oxley Act and the Foreign Corrupt Practices Act. Coupled with the increased cooperation between global enforcement authorities that resulted in an exponential growth in prosecution for corporate violations, legal compliance became vital in preventing small issues from becoming those that attracted the attention of authorities.

Legal compliance is a diverse and dynamic field requiring knowledge of a range of legal subject areas and affecting many sectors. In this paper, we discussed the prominent fields of Antitrust and Bribery & Corrupt Practices Compliance, but could very well have discussed compliance issues involving insurance or education law. There are just as many types of corporations that utilize compliance departments as there are subject areas; here, the banking sector was explored via a discussion of its anti-money laundering compliance programs. This program is crucial to ascertaining whether funds circulating through financial institutions have been derived from legitimate business operations.

The lesson learned through the Siemens, AG case study illustrates the importance of conducting sound business operations in even the most legally far-removed markets. For over a decade, Siemens, AG systematically exploited markets with weak governance standards through the payment of bribes to government officials in order to win lucrative infrastructure projects. Despite having a compliance department, executive management intentionally undermined its efforts by understaffing, overburdening, and simply, ignoring it. This so-called "paper [compliance] program" resulted in Siemens, AG having to pay the largest ever Foreign and Corrupt Practices Act enforcement settlement. What resulted was a dramatic turnaround through changes in the "tone at the top" of the company and a company-wide overhaul that included hiring compliance specialists and training all employees in anti-corruption measures. Siemens, AG is now a model for corporate

Conclusion

compliance departments worldwide. One reason why Siemens, AG was able to make such a turnaround was its openness to emerging ideas within the compliance community.

The emerging issues in corporate compliance explored in this paper include the rise of a new corporate personality, the ombudsman, and the increased attention given to e-compliance. While the office of the ombudsman was not put into place at Siemens, AG, many corporations are seeing the value in having an independent entity that complements their compliance departments through more informal means. From a strategic viewpoint, the "ombudsman privilege" can prove invaluable to a corporation in a sector vulnerable to compliance failures as the risk of incipient issues being publicized can be minimized from its usage. What was once viewed as strategic but is now a corporate imperative is the attention given to e-compliance. The internet and its related technologies are forcing compliance operations to navigate a new, increasingly legislated, landscape: online operations. For the modern corporation, e-compliance is unavoidable.

Although throughout history corporations have taken a reactive stance to government crackdowns on their conduct, the attention and allocation of resources to compliance departments amongst today's corporations perhaps signals a change in ethos. The new norm? Prevention of problems via proactive means developed by corporate compliance departments, in lieu of reactive measures from legal departments. Effective use of corporate compliance departments should usher in a culture of good governance that will be reflected in improved corporate conduct across the globe.

APPENDIX 1

4. Sentencing Guidelines Calculation and Criminal Penalties

a. Siemens Sentencing Guidelines Calculation

As set forth in paragraph 4 of the plea agreement, the parties agree that the following Sentencing Guidelines provisions, using the 2007 Sentencing Guidelines Manual, apply based on the facts of this case, for purposes of determining an advisory guideline range:

§ 2B1.1(a)(2)	Base Offense Level	6
§ 2B1.1(b)(1)(P)	Loss of \$400 million or more	30
§ 2B1.1(b)(2)(c)	Over 250 victims	6
§ 2B1.1(b)(9)	Significant Conduct Outside U.S./ Sophisticated Means	2
TOTAL OFFENSE LEVEL		44

Calculation of Culpability Score:

§ 8C2.5(a)	Base Score	5
§ 8C2.5(b)(1)	5,000 or More Employees and High-Level Personnel Involvement/ Pervasive Tolerance	5
§ 8C2.5(g)(2)	Full Cooperation and Acceptance of Responsibility	-2
TOTAL CULPABILITY SCORE		8

Calculation of Fine Range:

Base Fine: Greater of the amount from table in U.S.S.G. § 8C2.4(a)(1) & (d) corresponding to offense level of 44 (\$72,500,000), or the pecuniary gain/loss from the offense (\$843,500,000)

(U.S.S.G. § 8C2.4(a)(2)):	\$843,500,000
Multipliers, culpability score of 8 (U.S.S.G. § 8C2.6):	1.6-3.2
Fine Range (U.S.S.G. § 8C2.7):	\$1.35 billion - \$2.70 billion

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